NO. 82-1205

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

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DR. GRANVILLE M. SAWYER, ET AL.,
*Petitioners*

v.

IRANIAN STUDENT ASSOCIATION,
PEREYDOUN KIANI-ZEINABAD,
Individually And On Behalf Of All Others
Similarly Situated,
*Respondents*

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# Petition For Writ of Certiorari To The United States Court Of Appeal For The Fifth Circuit

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SUPREME COURT OF THE UNITED STATES
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DR. GRANVILLE M. SAWYER, ET AL.,
*Petitioners*

v.

IRANIAN STUDENT ASSOCIATION,
PEREYDOUN KIANI-ZEINABAD,
Individually And On Behalf Of All Others
Similarly Situated,
*Respondents*

Petition For Writ of Certiorari
To The United States Court Of Appeal
For The Fifth Circuit

Petitioners, Dr. Granville M. Sawyer, et al., respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court ox Appeals for the Fifth Circuit entered on September 13, 1982, with Petitioners' timely Motion for Rehearing En Banc denied on October 12, 1982.

## QUESTION PRESENTED FOR REVIEW

The principle question presented for review is: Whether the Court of Appeals correctly held that the Iranian Student Association and Pereydoun Kiani-Zeinabad, individually and on behalf of all others similarly situated, as plaintiffs, were "prevailing parties" for purposes of attorney's fees under 42 U.S.C. § 1988 when the state defendants were not allowed an opportunity to prove that the alleged constitutional violations were not true.

## PARTIES TO THE PROCEEDINGS

In the District Court below, the Iranian Student Association and Pereydoun Kiani-Zeinabad, individually and on behalf of others similarly situated, as plaintiffs, brought suit against:

Dr. Granville M. Sawyer
President - Texas Southern University, individually and in his official capacity

George L. Allen
Ernest S. Sterling
Mrs. Naomi Cox Andrews
B. Dubois Brown
Milledge A. Hart, III
Rev. M. L. Price
Ronald B. Puritt
Richard Reyes
Judson W. Robinson, Jr., individually and as members of the Board of Regents of Texas Southern University

While many of the named defendants no longer serve in the capacities described, no defect as to parties is alleged by Petitioners since the State of Texas is the real party in interest.

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## INDEX OF AUTHORITIES

## OPINIONS BELOW

The opinion of the Court of Appeals for which review is sought is not reported. A copy of the opinion is, however, included in the Appendix to this Petition. The District Court opinion with findings of fact and conclusions of law is not reported but is included in the Appendix together with the District Court's judgment. The earlier opinion of the Fifth Circuit and its final order denying rehearing are both set out in the Appendix. The denial of rehearing is reported at _____F.2d _____.

## JURISDICTION

The opinion of the Court of Appeals was entered on September 13, 1982. Petitioner's Petition for Rehearing En Banc, which was timely filed, was overruled by the Court of Appeals on October 12, 1982. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

## STATUTES INVOLVED

The free speech clause of the First Amendment and the Fourteenth Amendment to the United States Constitution are both involved in this cause.
The First Amendment provides in part:

> Congress shall make no law...abridging the freedom of speech, or the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The Fourteenth Amendment provides in pertinent part:

> ...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law...

The Attorneys' Fees Act, 42 U.S.C.A. § 1988, provides:

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provisions of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States a reasonable attorney's fee as part of the costs."

## STATEMENT OF THE CASE

In the Fall of 1978, Dr. Granville Sawyer, then president of Texas Southern University, and with approval of the members of the board of regents of the University issued a memorandum banning all protest marches and demonstrations from the university's campus for an indefinite period of time. This action was taken in response to violently disruptive and potentially dangerous demonstrations on the campus which had involved Iranian students. Some 12 days after the ban was imposed, suit was filed by the Iranian Student Association and an individual Iranian student, individually and on behalf of others, attacking the ban as an unconstitutional infringement of their First and Fourteenth amendment rights under 42 U.S.C. §§ 1983, 1985 and 1986. The day after suit was filed, Dr. Sawyer issued a memorandum which rescinded the ban and which stated the University's positions on several issues of concern to the Iranian Student Association. These issues had been earlier presented to Dr. Sawyer in a conference with plaintiffs' attorneys. After the ban was lifted, all parties to the suit agreed the case was moot except as to the issue of attorneys' fees. After an informal hearing the District Court determined that plaintiffs were the "prevailing parties" in the context of the Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. § 1988, and awarded attorneys' fees to them in the amount of $4,181.25. On appeal, the Court below vacated the judgment and remanded for a full evidentiary hearing on the prevailing party issue. *Iranian Students Association v. Sawyer,* 639 F.2d 1160 (5th Cir. 1981). After hearing was held the District Court again awarded attorneys' fees to the plaintiffs and the defendants appealed.

Affirming the District Court's judgment, the Court below held that the two requirements used to determine whether a party is a prevailing party within the meaning

of 42 U.S.C. § 1988 had been met. With regard to the required factual determination, the Court below held that the ban was lifted because the plaintiffs filed a lawsuit challenging the ban's imposition. With regard to the second requirement, a legal determination, the Court below held that because the plaintiffs' suit had presented significant constitutional claims, it was not a "frivolous" lawsuit. The Court below further found that the amount of attorney's fees awarded to plaintiffs by the District Court was properly determined within the court's discretion.

Petitioners admit that the decision of the Court below may be in accord with the law as announced by the Circuit. That holding, however, runs counter to logic, reason, fairness and due process, and violates the law as announced by this Court and the principles of federalism implicit in the Constitution of the United States.

## REASONS FOR GRANTING THE WRIT

In the case at bar, attorney's fees have been levied against the State of Texas without any decision as to whether the State acted improperly or illegally.

The Court below held that a civil rights plaintiff is a "prevailing party" under 42 U.S.C. § 1988 where (1) some interlocutory relief has been achieved even if not legally proper, and (2) the case filed is not "frivolous." (Citing its prior decision in *Iranian Students Association v. Sawyer*, 639 F.2d 1160 (5th Cir. 1981). The court, however, issued its decision without any consideration as to whether the plaintiffs would prevail if the defendants were permitted to offer a legal defense of their actions.

The seriousness of the District Court's decision, as supported by the Court below, is of significance because liability for attorneys' fees inflicts severe financial

penalties. Exposure of any party to such penalties, when mootness deprives a party of a judicial determination of a lawsuit's meritoriousness, should result only from a clear authorization by Congress or, as stated by Justice Rehnquist, by settled precedent of this Court. *See Alioto v. Williams*, _____ U.S. _____, 101 S.Ct. 1723, 1724 (1981). Furthermore, the offensiveness of holding the State of Texas subject to a fee award of $21,975.10 is even more apparent when the record of this case is examined.

In this case the Petitioners repeatedly suggested, entreated and finally demanded that the District Court allow them the opportunity to offer evidence that Iranian demonstrations were properly banned because of the clear and present danger of violence and disruption of University activities. In support of this defense, they attempted to show that the continuing incidents involving Iranian students where the students intentionally disrupted University classes; blocked traffic on the campus; threatened violence to visitors on the campus; and finally caused so serious a disturbance that the City of Houston riot squad had to be called to campus to disperse students and restore security, clearly demonstrated that imposition of the ban on campus demonstrations was constitutionally proper. The District Court, however, refused to allow Petitioners to present a legal defense for their actions — it refused to allow a showing of a requisite state interest which would support the State's impingement of the plainiffs' alleged First Amendment rights.

The decision of the Court below — that a prevailing party is one who achieves an interlocutory victory combined with a non-frivolous cause of action — is in conflict with the reasoning of this Court in *Hanrahan v. Hampton*, 446 U.S. 754 (1980), wherein the Court stated, at page 757, that attorney's fees are only proper where a party has *established* "his entitlement to some relief on

the merits of his claims," and only "when a party has prevailed on the merits of at least some of his claims."

In the case at bar, there has been *no* decision on the merits — was the ban on demonstrations proper in view of the past experiences of violence and disruption and the continued threat of violence and disruption? As previously stated, Petitioners have never had the opportunity to answer the question. Ergo, no decision has ever been reached on the merits of the ban.[1]

It should be further noted that all the authorities cited by the Court below as support for its finding of a "non-frivolous" suit show that some judicial determination must be made of whether or not a defendant's behavior is actually unconstitutional.[2] The decision of the Court below therefore departs from the requirement that an underlying constitutional violation must be proved and instead only requires that some temporary relief be

1. The only part of the Court below's decision that is felt to be correct is the discussion concerning the jurisdiction of the ban under the Texas Education Code. The Code cannot justify the ban, but the clear and present danger of disruption and violence can legally support the ban against demonstrations if proof of this danger could only be offered.

2. The case of *Riddell v. National Democratic Party*, 624 F.2d 539 (5th Cir. 1980) assumes that attorney's fees are proper to enforce legitimate Constitutional rights. The court entered a decision on the merits of the civil rights claim which was presented in the case. In the case at bar, the Court below did not.

In *Robinson v. Kimbrough*, 652 F.2d 458 (5th Cir. 1981), the Court below concluded that the lawsuit brought was a "significant catalyst in motivating the defendants to end their *unconstitutional behavior*" (652 F.2d at 466, emphasis supplied) before the court held that the plaintiff was entitled to attorney's fees. Clearly the Fifth Circuit requires some determination of a defendant's "unconstitutional behavior." *See Williams v. Leatherbury*, 612 F.2d 549 (5th Cir. 1982).

achieved and that a plaintiff plead a "non-frivolous" lawsuit. This holding is wrong and cannot substitute for proof of some actual civil rights denial. *See Hanrahan v. Hampton, supra.*

This Court should grant the Writ of Certiorari in this cause and hold that, even where a case is judged moot, proof of the case's merit (in the case at bar, a showing that the Petitioners actually violated the plaintiffs' constitutional rights) must be made before a plaintiff may subject a state defendant to attorney's fees under 42 U.S.C. § 1988.

## ADDENDUM

The award of attorney's fees against Texas Southern University, without permitting it to present its defenses to the plaintiffs' constitutional claims, violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution if the University can be considered to be a person.[3] Without regard, however, to whether the University is a person, "Our Federalism" constitutionally prohibits the federal government, by the enacting of 42 U.S.C. § 1988 and by judicial interpretation, from exacting money from the states without a showing of culpability. *Younger v. Harris,* 401 U.S. 37 (1971).

In the federal system the federal government must give due deference to the responsibilities of the states to keep the peace and provide public education. *See National League of Cities v. Usery,* 426 U.S. 833 (1976).

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3. Whether a university is a "person" within the parameters of the Fourteenth Amendment has never been completely resolved. *See Monell v. Soc. Serv. of New York,* 436 U.S. 658 (1978). However, it should be noted that there are ten defendants in the case at bar who have been sued in their "individual" capacities. Clearly the rights of these persons are protected by the Fourteenth Amendment.

Imposing substantial liabilities on a state without requiring a finding of fault offends the doctrine of "Our Federalism."[4]

## CONCLUSION

For the foregoing reasons, a Writ of Certorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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Attorney General of Texas

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4. As U.S.C. § 1988 has been construed by this Court, the statute is "appropriate" legislation for implementing the guarantees of the Fourteenth Amendment of the U.S. Constitution.

## CERTIFICATE OF SERVICE

I, Laura S. Martin, Assistant Attorney General, do hereby certify that three copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was served upon Respondents by depositing same in the United States Mail, certified, return receipt requested to the following attorneys of record for appellees: Mr. J. Patrick Wiseman, Nelson & Mallett, 3303 Main Street, Suite 300, Houston, Texas 77002; and Mr. Van Vamacka, 210-C Stratford, Houston, Texas 77006, on this the _____ day of January, 1983.

LAURA S. MARTIN

# APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 81-2458
Summary Calendar

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IRANIAN STUDENT ASSOCIATION,
PEREYDOUN KIANI-ZEINABAD,
individually and on behalf of
all others similarly situated,
*Plaintiffs-Appellees,*

versus

DR. GRANVILLE M. SAWYER,
ET AL.,
*Defendants-Appellants.*

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Appeal from the United States District Court for the
Southern District of Texas

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SEPTEMBER 13, 1982

Before GEE, RANDALL, and TATE, Circuit Judges.

TATE, Circuit Judge:

This case comes to us for the second time on appeal. On the first hearing in this court, we remanded for an evidentiary hearing to determine which party was entitled to attorneys' fees as a "prevailing party" within the meaning of The Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. § 1988. Iranian Students Association v. Sawyer, 639 F.2d 1160 (5th Cir. 1981). Now, finding no error in the district court's

determination that the plaintiffs are the prevailing parties, we affirm. We affirm also the amount of attorneys fees awarded.

## THE FACTUAL BACKGROUND

On October 14, 1978 defendants, Dr. Granville Sawyer, the then president of Texas Southern University, and members of the board of regents of the university issued a memorandum decreeing that "[a]ll protest marches, demonstrations, etc. are banned from the campus *indefinitely.*" (emphasis added) This action was taken in response to disruptive and potentially dangerous demonstrations on the campus involving Iranian students. On October 26, 1978, 12 days later, this suit was filed by plaintiffs, the Iranian Student Association, and an individual Iranian student, individually and on behalf of others, attacking the ban as an unconstitutional infringement of their first and fourteenth amendment rights under 42 U.S.C. §§ 1983, 1985, and 1986. A day after suit was filed, another memorandum was issued by Dr. Sawyer's office rescinding the ban and seemingly addressing all of the contentions raised by the plaintiffs. By mutual agreement, the suit was subsequently declared to be moot except as to the issue of attorneys' fees. After an informal hearing, from which no transcript was taken, the district judge determined that plaintiffs had been the "prevailing parties" in the context of the Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. § 1988, and he awarded attorneys' fees to them in the amount of $4,181.25. This court, on appeal, vacated the judgment and remanded for a full evidentiary hearing on the prevailing party issue. Iranian Students Association v. Sawyer, 639 F.2d 1160 (5th Cir. 1981). The district court again awarded attorneys' fees to the plaintiffs.

Texas state law permits a university to exclude persons from its premises in certain circumstances,

V.T.C.A., Education Code §§ 51.231 et seq. This exclusion, however, is allowed only for a period of fourteen days, and the statute mandates that certain procedures be followed for it to be invoked.[1] The statute does not specifically authorize a ban as was imposed in this case. Granting, however, for purposes of this appeal, that the statute can be utilized to create the ban in question, the procedures were not properly followed. In fact, the memorandum creating the ban, by its very terms, was to persist indefinitely.

With the ban, Dr. Sawyer also instituted an ad hoc panel to review the situation and submit its findings to him. These findings were purportedly to form the basis for the lifting of the ban. There was testimony indicating that at no time was there any adversion by Dr. Sawyer to the statutory basis for the ban, nor was there any statement respecting a time limit. In fact, there was testimony that at the preliminary meeting of the panel, Dr. Sawyer was asked about the need for speed, and he responded that there was no such need. The panel then set its first substantive meeting for one week from that date and adjourned. Later, at trial, a "preliminary report" of this panel was introduced into evidence. The defendents contend that their decision to lift the ban was based solely on this report. However, this report was allegedly written two days before the substantive meeting was even scheduled to be held. There was also no evidence introduced as to where the panel meeting was held or as to who was present. In addition, there was testimony by a member of the panel, who presumably would have known of any unscheduled

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1. These procedures include that notice be given directly to the persons excluded, and that these persons be informed of their right to a hearing upon request and informed of the fourteen day limitation.

meetings, to the effect that he was not informed of any preliminary report or any meeting called for the purpose of writing one.

On October 25, eleven days after the imposition of the ban, the plaintiffs' attorney contacted the defendants' attorneys to inform the latter that suit would be filed in the absence of their assurance that the ban would immediately be lifted. The plaintiffs allege that this assurance was not given, and that this suit was thereafter filed. Subsequently, after filing, and after a meeting between counsel for both parties, the ban was lifted.

## THE APPLICABLE STANDARDS OF REVIEW

In determining whether a party is a prevailing party within the meaning of § 1988, it is necessary that two requirements be met. The first requirement is a purely factual determination—whether the plaintiff's lawsuit is a substantial factor or significant catalyst in achieving the desired results. Robinson v. Kimbrough, 652 F.2d 458, 466 (5th Cir. 1981), Iranian Students Association v. Sawyer, 639 F.2d 1160, 1163 (5th Cir. 1981). In other words, in the instant case, was the lifting of the ban caused in whole or in part by the filing of this lawsuit. This is a purely factual question, and as such is reviewable under the clearly erroneous standard. The factual findings of the trial court will therefore be upheld unless after reviewing the evidence the appellate court is "left with the definite and firm conviction that a mistake has been committed." United States for Use and Benefit of General Electric Supply Co. v. Wiring, Inc., 646 F.2d 1037, 1041 (5th Cir. 1981), quoting from United States v. United States Gypsum Co., 333 U.S. 364, 395, 68 S.Ct. 525, 542 (1948).

The second requirement is a legal determination and as such is independently reviewable by the appellate

court. Simply put, this question is whether the defendants' action in voluntarily meeting the demands of the plaintiffs is the result of a "frivolous, unreasonable, or groundless" lawsuit. Iranian Students Association v. Sawyer, 639 F.2d at 1164 n.6.

Concerning the issue of attorneys' fees, a reasonable compensatory amount is to be awarded in accordance with the criteria established in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974). If these criteria are followed by the trial judge, we will not overturn his findings unless he has abused his discretion, Parker v. Anderson, 667 F.2d 1204, 1213 (Former 5th Cir. 1982).

## THERE WAS A CAUSAL LINK BETWEEN THE FILING OF THE LAWSUIT AND THE RESULTS OBTAINED

While the chronology of events leading to the results achieved are not solely determinative on the issue of causation, the sequence is nonetheless important in ascertaining whether the lawsuit was a factor in bringing about the results achieved. Robinson v. Kimbrough, 652 F.2d at 466. In the instant case, the ban was lifted the day after the lawsuit was filed. The defendants allege, however, that the decision to lift the ban had already been made at the time the suit was filed, that it had been made independently of the lawsuit (in reliance on the preliminary report), and that the plaintiffs had been informed on the day of filing that the ban would definitely be lifted the next day. They allege that it would have been lifted the next day at any rate as a matter of law in compliance with the fourteen day statutory limit. And that knowing this, the plaintiffs filed suit solely for the purpose of getting an award of attorneys' fees. The plaintiffs allege, however, and introduced evidence to establish, that although they had been informed of the *possibility* that the ban would be lifted the

next day, they had received no assurance of this, and had clearly informed the defendants that without this assurance, the suit would be filed. They also contend that the ban was meant to last indefinitely and would not have been lifted had not their lawsuit acted as a catalyst to bring about the change.

The court agreed with the plaintiffs that the ban, by its terms, had been intended to persist indefinitely and would not have been lifted pursuant to the statutory rule. Furthermore, the court found that the report from the ad hoc panel was of questionable reliability and was not the basis for the decision to lift the ban as was argued by the defendants. Thus, weighing the credibility of the parties and their witnesses, the trial court determined that the defendants' decision to lift the ban was motivated, at least in substantial part, if not wholly, by the plaintiffs' lawsuit. This conclusion is not clearly erroneous insofar as the factual determinations are concerned, and as a matter of law these findings support the district court's conclusion that the plaintiffs were the prevailing party.

## THE PLAINTIFFS' SUIT WAS NOT FRIVOLOUS, UNREASONABLE, OR GROUNDLESS

The Attorneys' Fees Awards Act of 1978 was enacted in order to ensure private plaintiffs enforcing legitimate civil rights a recourse for their validly incurred attorneys' fees. Riddell v. National Democratic Party, 624 F.2d 539 (5th Cir. 1980). The Act has been liberally construed so as to permit recovery even when the voluntary actions of a defendant moot the proceedings, Williams v. Leatherbury, 672 F.2d 549, 551 (5th Cir. 1982); Robinson v. Kimbrough, 652 F.2d 458, 465 (5th Cir. 1981), and even where liability is never either admitted or determined, Robinson v. Kimbrough, 652 F.2d at 465.

The plaintiffs' claims were not frivolous in the instant case. An indefinite ban was imposed on their right to express their views in marching and demonstrating. There were also indications that the ban extended to the students' right to express their views in writing and distributing leaflets.[2] There was no reference to any statutory authority for this infringement. The defendants themselves in brief (see p. 14) admit that substantial justification is needed for their actions. In view of the presence of these substantial potential first amendment violations, it cannot be said that the plaintiffs were instituting a frivolous lawsuit.

The trial court was therefore correct in not allowing the defendants an evidentiary hearing to justify the validity of the ban. A determination of the merits is not necessary when a claim is clearly not frivolous.[3] Iranian Students Association v. Sawyer, 639 F.2d 1160, 1164 n.6 (5th Cir. 1981).

## THE AMOUNT OF ATTORNEYS' FEES AWARDED IS AFFIRMED

On the initial hearing of this case in the trial court, the plaintiffs' attorney, Wiseman, was awarded a fee of $75/hour. On appeal, the judgment was vacated and

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2. This finding follows from testimony that students desiring to pass out leaflets were required to submit copies of the proposed messages to the Dean of Student Affairs for his approval. At least one draft of the proposed leaflet was required to be in English in order for the Dean to determine whether the proposed message was "inflammatory." If, in the Dean's judgment, the leaflets were inflammatory, he was given the discretion to prohibit their distribution.

3. We leave open the question as to how far a trial court needs to go in determining that a plaintiff's law suit is not frivolous. In the instant case, the questions raised by the suit are sufficiently clear.

remanded. On second hearing in the trial court, the plaintiffs' attorney was again awarded attorneys' fees but the initial hourly rate was increased from $75/hour to $90/hour for time spent before the vacating of the first judgment, and an additional award of $100/hour was given for time spent preparing the case after the order to vacate. For the reasons expressed below, we affirm the award.

The trial court was required, upon determining that the plaintiffs were the prevailing parties, to award a reasonable fee, taking into full account the criteria established in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974). With the record before us, we conclude that this was done. Although we find that the rate per hour seems high in view of the fact that most of the total award was incurred in determining who were the prevailing parties and in contesting the amount of attorneys' fees, we do not find that this amount is an abuse of the trial court's discretion. Awards this high have been given in other cases. Laje v. R.E. Thomason General Hospital, 665 F.2d 724, 730 (5th Cir. 1982); Neely v. City of Grenada, 624 F.2d 547, 551 (5th Cir. 1980). In addition, plaintiffs were totally successful in their claim, achieving substantial results for a broad class of plaintiffs, and the fee was totally contingent on their success. In addition, counsel for the plaintiff showed considerable preparation and skill in his presentation.

The defendants complain that it would be unfair to require them to pay attorneys' fees for contesting an award of attorneys' fees. However, a prevailing party is entitled to defend his judgment against an opponent who contests either the merits or the fees. While it is an integral part of the judicial process that losing parties may challenge a lower court's ruling on appeal, they take the risk that upon losing a second time, they will be

required to pay for having tried. Kingsville Independent School District v. Cooper, 611 F.2d 1109, 1114 (5th Cir. 1980).

The defendants contend that the number of hours alleged by plaintiffs as spent on this case were unnecessary. However, in view of the fact that no evidence was introduced to controvert the plaintiffs' affidavits and billing sheets, and in view of the fact that no specific excess was pointed to, we find that this contention is unsupported.

The defendants also allege that the three atttorneys utilized on the part of plaintiffs were unnecessary and resulted in substantial duplication of effort and that the number of attorneys was reasonable in light of the facts of this case. This case is therefore distinguishable from Taylor v. Sterrett, 640 F.2d 663, 670 (5th Cir. 1981).

The defendants also contend that because they prevailed on their first appeal, being held entitled to the evidentiary hearing that they requested, and because the costs of that appeal were taxed by the clerk against the plaintiffs, the plaintiffs were not the prevailing parties as to this first appeal and should not be awarded fees thereon. However, previous decisions have resolved these issues to the contrary. Hanrahan v. Hampton, 446 U.S. 754, 100 S.Ct. 1987 (1980) (Per Curiam) (a preliminary ruling by an appellate court that defendants are entitled to an evidentiary hearing does not make them prevailing parties as to the case), Robinson v. Kimbrough, 652 F.2d 458 (5th Cir. 1981) (fact that the fees and costs on one appeal were taxed by the clerk against the plaintiffs does not make the defendants the prevailing parties as to that appeal when the plaintiffs ultimately win the case).

The defendants' final contention concerns the "'undesirability' of the case." As stated in Johnson, 488 F.2d at 719,

> Civil rights attorneys face hardships in their communities because of their desire to help the civil rights litigant. (Citations omitted). Oftentimes his decision to help eradicate discrimination is not pleasantly received by the community or his contemporaries. This can have an economic impact on his practice which can be considered by the Court.

In the instant case, the trial court took into consideration certain derogatory remarks made in court by counsel for the defendants against counsel for the plaintiffs and later published by a local newspaper.[4] While we express doubt concerning whether the *Johnson* criteria are directed toward statements of this kind, not involving the controversial nature of certain civil rights cases, we find that the emphasis placed on other criteria by the court support the award of fees in this case.

The court found that the number of hours was reasonable, and that the customary fee for this type of work was between $60 and $150 per hour. The court "emphasized" the substantial results achieved and the skill and experience of counsel. The court gave "minimal emphasis" to the *Johnson* criteria respecting the preclusion of other employment. It "considered favorably" the fact that the lawyers' fee was totally contingent on success. Finally, the court considered the derogatory statements made by the defendants' counsel, and it considered them to be merely

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4. The plaintiffs' attorney was accused of having filed the lawsuit solely to gain an award of attorneys' fees.

"pertinent" to the determination of a reasonable fee. On the basis of this thorough enumeration of the *Johnson* criteria, and the minimal weight given to the final category, we do not disturb the lower court's fee determination.

In view of the trial court's consideration of the *Johnson* criteria, we find no abuse of discretion in the hourly rates awarded by the district court in this case. We also accept the rate increase from $75/hour to $90/hour for work done before the vacating of the first judgment. This increase was awarded in lieu of interest that would have accrued on the judgment had it been paid when first decreed. Although we question the propriety of a rate increase as opposed to an award of interest in all cases, we find that in the instant case, the higher hourly rate approximates the interest[5] that could have been awarded.

For the reasons stated, therefore, we do not find that there was an abuse of discretion in the amount awarded for attorneys' fees.

## CONCLUSION

Accordingly, we AFFIRM the determinations of the district court that the plaintiffs are the prevailing parties and in its award of attorneys' fees.

AFFIRMED.

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5. *See* Morrow v. Finch, 642 F.2d 823, 826 (5th Cir. 1981); Gates v. Collier, 616 F.2d 1268, 1272 (5th Cir. 1980), opinion modified on rehearing, 636 F.2d 942 (5th Cir. 1981), *reh. en banc den.* 641 F.2d 403 (5th Cir. 1981).

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

| | | |
|---|---|---|
| Iranian Student Association; Fereydoun Kiani-Zeinabad, individually and on behalf of all others similarly situated, | § | |
| *Plaintiffs,* | § | |
| V. | § | CIVIL ACTION |
| Dr. Granville M. Sawyer, ET AL., | § | No. H-78-2055 |
| *Defendants.* | § | |

J. Patrick Wiseman, 3303 Main, Suite 300, Houston, Texas Attorney for Plaintiffs.

Allan Vomacka, 210-C Stratford St., Houston, Texas, attorney for plaintiffs.

Laura Martin, Assistant Attorney General, P.O. Box 12548, Capitol Station, Austin, Texas, attorney for defendants.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER ON ATTORNEYS' FEES

### I. INTRODUCTION

This action was instituted on October 26, 1978, pursuant to 42 U.S.C. §§ 1983, 1985, 1986 and 1988. The plaintiffs, the Iranian Student Association (hereinafter I.S.A.) and Mr. Kiani-Zeinabad (hereinafter Kiani) requested declaratory and injunctive relief, as well as damages, for an alleged violation of the First Amendment to the United States Constitution. The named

defendants included Dr. Granville M. Sawyer (hereinafter Sawyer), the then President of Texas Southern University and each of the then members of the Board of Regents of that institution. Each defendant was sued individually and in his/her official capacity.

Some of the conduct alleged by plaintiffs to have been violative of their rights to freedom of speech, association and petition for redress of grievances was the subject matter of a memorandum issued by Sawyer on October 14, 1978: a ban of on-campus demonstrations, protest marches, and other unspecified activities for an indefinite duration; and a directive to University officials to identify and arrange for summary dismissal of student leaders of a protest march which had been conducted on October 13, 1978. Other conduct complained of by plaintiffs included withdrawal of on-campus-organization status from I.S.A. and the interruption of student leafletting.

By memorandum of October 27, 1978, Sawyer lifted the ban and made the following announcements with regard to plaintiffs' allegations: (1) No student would be dismissed without being afforded his/her right to a hearing; (2) duly registered student organizations would be entitled to full use of all campus facilities; and (3) no restrictions would be placed on distribution of leaflets and no requirement would be imposed that leaflets be written in English. Thereafter, defendants asserted in their original answer that the cause of action had been rendered moot by their actions, and plaintiffs moved for an award of attorneys' fees as the prevailing party. Without conducting an evidentiary hearing, this Court ordered that plaintiffs were the prevailing party and that plaintiffs were entitled to an award of reasonable attorneys' fees.

Defendants timely filed their notice of appeal. After oral argument, the Fifth Circuit vacated this Court's

orders and remanded the cause for a hearing on the issue of which side was the prevailing party:

> We therefore conclude the district court erred in failing to hold an evidentiary hearing on whether appellees' lawsuit was a significant catalyst to the rescission of the ban on campus demonstrations at Texas Southern University and remand for that purpose, and therefore to determine which side was the prevailing party in the case.

*Iranian Student Association v. Sawyer,* 639 F.2d 1160, 1164 (5th Cir. 1981)(footnote omitted).

In compliance with those instructions, this Court scheduled a hearing to the Court on August 4, 1981. At the conclusion of the hearing, the Court entered its Bench Ruling holding that plaintiffs' action in filing their lawsuit was not groundless, frivolous or unreasonable, and that their cause of action was a significant catalyst to defendants' decision to lift the ban on First Amendment activities. Pursuant to Rule 52, Fed. R. Civ. P., the Court enters the following Findings of Fact and Conclusions of Law in conformity with that Bench Ruling.

## II. FINDINGS OF FACT

1. On October 13, 1978, an on-campus protest march conducted by Iranian students precipitated a generalized disturbance near and within the student center. Testimony of Granville Sawyer; Testimony of Everett Bell.

2. As a result of that disturbance, Sawyer met with other University officials on October 13, 1978 and the following day, and ultimately determined that he should institute a ban of on-campus demonstrations. Accor-

dingly, on October 14, 1978, Sawyer issued a memorandum which included the following directives: (1) a ban of indefinite duration was imposed on "[a]ll protest marches, demonstrations, etc."; (2) university officials were to seek out and summarily dismiss student leaders of the October 13, 1978 protest march, and were to involve immigration officials in the dismissals as appropriate; and (3) an "Ad Hoc Panel of Inquiry" composed of students, faculty and staff representatives was convened to review prior disturbances by Iranians on the Texas Southern campus, develop criteria to ensure that uninvolved Iranian students would not be held liable for disturbances, and develop criteria "for dismissing from the University those students who would perpetuate disorder on the campus". Testimony of Granville Sawyer; Testimony of Everett Bell; Plaintiffs' Exhibit 1.

3. Prior to October 14, 1978, the University policy concerning student requests to distribute leaflets or to conduct demonstrations was that students were to make requests orally to the Dean of Students, two days in advance of the desired date for the on-campus activity. After the ban was imposed, Kiani, as Vice-President of I.S.A. at the University, followed the University policy and made two oral requests of Dean Walker, one to pass out leaflets on October 19, 1978 and another to conduct a demonstration on October 20, 1978. Dean Walker asked Kiani to put the requests in writing, which Kiani did. Subsequently, permission was denied orally for both activities. Testimony of Kiani; Plaintiffs' Exhibits 2, 2A, 3, 3A.

4. On October 19, 1978, John Westberry, the Registrar of Records and Admissions, convened the first meeting of the ad hoc panel of inquiry as its chairman. Kiani was appointed a member of this panel, and openly recorded the discussion at that session. During that meeting, Kiani mentioned to Sawyer the denied re-

quest to distribute leaflets, and asked Sawyer whether the ban encompassed leafletting. Sawyer's initial response was that leafletting was not included; however, simultaneously he indicated to Kiani that he expected students to use constraint with regard to the content of leaflets. The discussion of leafletting continued when Dean Williams explained to Sawyer that leaflets of the kind Kiani referred to were "political and inflammatory", in that they were anti-Shah and anti-President of the United States, and that such leafletting had been stopped because of the disruptive potential of the content. Sawyer then inferentially retreated from his position that leafletting was not included in ban, stating that he would support such an administrative decision and that he would leave the decision ofwhat was inflammatory to the judgment of the Dean of Students. Sawyer indicated that he would approve if Kiani wanted to distribute leaflets that were not inflammatory.

Sawyer then reiterated that the ban was imposed only on marches and demonstrations. The impact of Sawyer's comments regarding the content of leaflets, however, was that the Dean of Students had discretion to determine whether certain leaflets would undermine the intent of the ban and accordingly could deny permission for those leaflets to be distributed. Thus, although Sawyer was unwilling to state outright that the University would prohibit leafletting as well as protest marches and demonstrations, Sawyer impliedly gave University officials his permission and approval to prevent certain leaflets from being distributed. In response to another of Kiani's inquiries about leaflets, Sawyer indicated that the regulations of the University required that English translations be provided for all proposed leaflets or announcements for bulletin boards. Testimony of Kiani; Plaintiffs' Exhibit 4.

5. During that first meeting, Sawyer explained to the panel that he had instituted the ban in order to allow time for the panel to review the adequacy of existing University regulations concerning protest marches and demonstrations. He charged the panel with responsibility for analyzing and resolving several issues, including an investigation of prior disruptions on the campus, and he told the panel that he did not anticipate a quick resolution of any of the issues. He defined as the panel's first priority, formulation of a document specifying criteria and procedures for peaceful on-campus protesting, and instructed the panel that he wanted the matter reviewed in great detail. Sawyer further indicated that after the criteria were established and Sawyer was sure that the students understood and would abide by such criteria, he would lift the ban. At the end of the meeting, the panel decided to meet again on the next Friday, which would have been October 27, 1978, at 3:00 p.m.. Plaintiffs' Exhibits 4; 9; Testimony of Kiani.

6. Sawyer testified that he had instituted the ban because of the dangerous situation during the October 13, 1978 demonstration. He further indicated that in taking such emergency measures, he had relied on Tex. Educ. Code Ann. tit. III, § 51.233, and therefore intended from the outset that the ban last only fourteen days. Sawyer, however, did not refer to the statute nor to any time limit on the ban, either in the memorandum of October 14, 1978 in which the ban was imposed or at the October 19, 1978 meeting of the ad hoc panel of inquiry. Further, the evidence was clear that a peaceful demonstration had been conducted on the boundaries of the campus on October 20, 1978. Thus, although Sawyer imposed the ban as an immediate solution to what he perceived as an emergency, he also intended that the ban would last as long as was necessary to allow the panel to develop criteria for peaceful on-campus demonstrations. The Court finds that when Sawyer in-

stituted the ban, he had in mind no definite time for its expiration. Testimony of Granville Sawyer; Plaintiffs' Exhibits 1, 4, 9.

7. On October 25, 1978, counsel for plaintiffs provided informal notice to defendants regarding plaintiffs' intention to initiate legal proceedings in federal court. Counsel for plaintiffs testified that he tendered this notice for the sole purpose of complying with the requirements of Rule 65(b), Fed. R. Civ. P.. He spoke to both the general counsel's office at Texas Southern University and to the Houston office of the Attorney General of Texas. Counsel for plaintiffs spoke to Robinson King, the general counsel for T.S.U., on October 26, 1978, and informed him that the filing of plaintiffs' lawsuit was imminent. Testimony of Patrick Wiseman.

8. Sawyer testified that he received a preliminary report from the ad hoc panel on October 25, 1978, and that on the basis thereof, he then decided to lift the ban. The Court finds that the ad hoc panel did not issue such a report as a result of the October 19, 1978 meeting, and that no evidence was presented that the panel, or any portion thereof, met any other time prior to October 25, 1978 in order to prepare such a report. Thus, the Court can make no determination regarding the origin of the report. The Court, however, does find that said report was immaterial to the decision to lift the ban. Testimony of Granville Sawyer; Testimony of Kiani; Plaintiffs' Exhibit 9; Defendants' Exhibit 7.

9. On October 26, 1978, Nathan Johnson, an Assistant Attorney General in Austin, called counsel for plaintiffs to determine the background of plaintiffs' claim. Having been provided with this information, Johnson asked Wiseman to delay filing of his suit until Johnson could contact Sawyer. Counsel for plaintiffs agreed. Approximately one (1) hour later, Johnson call-

ed Wiseman a second time. What transpired in the second conversation was the subject of conflicting testimony; however, the Court finds by a preponderance of the credible evidence that the following discussion took place. Johnson informed Wiseman that the ban probably would be lifted the next day, but when asked for his professional assurance that it would be lifted, Johnson would not give such assurance. Johnson indicated that he would be in Houston the following day, and suggested that perhaps the attorneys could get together and work things out. Wiseman agreed to the meeting, but told Johnson that he would not refrain from filing suit without an assurance that the ban would be lifted the next day. Testimony of Patrick Wiseman.

10. Shortly after that conversation, plaintiffs filed their complaint and application for a temporary restraining order. This Court scheduled a hearing for the early part of the week of October 30, 1978, and the matter was continued until that time.

11. On October 27, 1978, counsel for plaintiffs and defendants met on the campus of Texas Southern University. Sawyer and Bell also were present during various portions of this meeting. Johnson testified that at this meeting he was provided with copy of plaintiffs' original complaint and informed that a hearing on a temporary restraining order had been scheduled. Pursuant to this information and the University's agreement that it would lift the ban, the parties resolved to forego the hearing on the temporary restraining order, and proceed to a hearing on preliminary injunction. The participants generally discussed the ban, in addition to questions of leafletting on the campus, the right of access to campus facilities and privileges which had been withheld from the I.S.A. after the initiation of the ban, the immigration implications of defendants' threat of summary dismissals, and other matters of concern to plaintiffs. Testimony of Patrick Wiseman; Testimony of Nathan Johnson.

12.After this meeting, defendants issued a second memorandum in which the ban on demonstrations was rescinded and each of the other concerns which plaintiffs had mentioned at the October 27 meeting was resolved. The ban on demonstrations was lifted; summary dismissals were redefined as providing due process; the I.S.A. was assured that it was entitled to the use of all campus facilities in accordance with the rules and regulations of the University; and Sawyer withdrew not only his support for restrictions on the distribution of leaflets but also the requirements that leaflets be written in English. Each of the particular issues addressed in the memorandum of October 27, 1978 was included on the advice of defendants' counsel and as a result of plaintiffs' having filed a lawsuit in which those particular allegations were made. Testimony of Granville Sawyer; Testimony of Nathan Johnson; Plaintiffs' Exhibit 5.

## III. CONCLUSIONS OF LAW

1. Section 1983 allows a plaintiff a right to recover if a defendant acts under color of state law to deprive the plaintiff of a right secured by the Constitution or laws of the United States. *See, e.g., Addicks v. S. H. Kress & Co.*, 398 U.S. 144 (1970). If such a deprivation is established, the Civil Rights Act provides that the defendant "shall be liable to the party in an action at law, suit in equity, or other proper proceedings for redress." 42 U.S.C. § 1983. In a cause where a plaintiff prevails under a Section 1983 action, he/she generally is entitled to an award of reasonable attorney's fees pursuant to 42 U.S.C. §1988.

2. Had plaintiffs' cause proceeded to trial, plaintiffs would have had to prove by a preponderance of the evidence that their First Amendment rights were violated by defendants. *See, e.g., Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S.

274 (1977). Inasmuch as plaintiffs' cause was rendered moot by defendants' actions, however, this Court's legal inquiry into whether plaintiffs prevailed is narrower:

> Although it is true no fees could be awarded had the court ruled no rights were violated, it would be ineffectual to require the court to hear the complete litigation on a matter already moot. It is enough to meet the legal requirement to be sure the litigation is not "frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so."

*Iranian Students Association v. Sawyer*, 639 F.2d 1160, 1164 n. 6 (5th Cir. 1981), quoting *Christianburg Garment Co. v. E.E.O.C.*, 434 U.S. 412, 422 (1978).

The evidence adduced at the hearing clearly reveals that the ban imposed by Sawyer was utilized by other University officials to prohibit dissemination of certain leaflets depending on their content, and that one particular such decision was supported by Sawyer in his capacity as President of the University. Such a prohibition constitutes a prior restraint on First Amendment activities. *See, e.g., National Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977)(per curiam); *Freedman v. Maryland*, 380 U.S. 51 (1965). The Court has considered sufficient evidence to determine that plaintiffs herein had a legitimate concern regarding a prior restraint on First Amendment activities. On that basis alone, plaintiffs' suit could not be considered frivolous, unreasonable or groundless. *See Nadeau v. Helgemoe*, 581 F.2d 275, 281 (1st Cir. 1978). Accordingly, plaintiffs have satisfied the first prong of their burden in this case. *See Iranian Students Association v. Sawyer, supra*, at 1163, quoting *Robinson v. Kimbrough*, 620 F.2d 468, 478 (5th Cir. 1980). Refer to Findings 2-4.

3. The second prong of plaintiffs' burden consists of their demonstrating that defendants' actions in lifting the ban were related causally to plaintiffs' filing their lawsuit. "[T]he record must reflect ample evidence of a link between the litigation and [defendants'] action before [this Court] can award attorneys' fees under section 1988. ...This relationship must be more than simple knowledge that litigation may occur." *Id.* at 1163 (citation omitted). Further, the chronological sequence of events is an important factor to consider in the determination of whether plaintiffs prevailed, but it is not dispositive. *See Nadeau v. Helgemoe, supra,* at 281.

In concluding that plaintiffs satisfied their burden of demonstrating that their lawsuit was a significant catalyst to defendants' lifting the ban, this Court has considered the following: (1) Sawyer did not intend a definite expiration date for the ban nor did he charge the ad hoc panel with a time limit for any of their tasks; (2) defendants had informal notice of the impending suit as early as October 25, 1978; (3) no formal meeting of the ad hoc panel was scheduled between October 19 and October 27, 1978, for the purpose of preparing an interim report to Sawyer, or for any other purpose, nor was evidence presented to show that such a meeting took place in which the panel's alleged interim report was prepared; (4) the panel specificially was charged to investigate Iranian disturbances on campus during the twelve (12) months prior to October 1978; (5) the ban was utilized by certain University officials to prohibit leafletting by the I.S.A.; (6) a peaceful demonstration had been conducted on the perimeters of the campus on October 20, 1978; and (7) on October 27, 1978, after defendants' counsel knew the suit had been filed, a memorandum was issued by Sawyer in which all of the allegations of plaintiffs' complaint were addressed and resolved. On the basis of that evidence, the Court concluded that plaintiffs' lawsuit was a significant catalyst in defendants' decision to lift the ban. Refer to Findings 2-12.

4. The Court hereby orders that plaintiffs prevailed in the instant cause, and they are entitled to an award of reasonable attorneys' fees, as specified below.

## IV. ATTORNEYS' FEES

In the Fifth Circuit the determination of a reasonable award of attorneys' fees must be governed by the guidelines specified in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974):

(1) The time and labor required;

(2) The novelty and difficulty of the questions;

(3) The skill requisite to perform the legal service properly;

(4) The preclusion of other employment by the attorney due to acceptance of the case;

(5) The customary fee;

(6) Whether the fee is fixed or contingent;

(7) Time limitations imposed by the client or the circumstances;

(8) The amount involved and the results obtained;

(9) The experience, reputation and ability of the attorneys;

(10) The "undesirability" of the case;

(11) The nature and length of the professional relationship with the client; and

(12) Awards in similar cases.

*Johnson v. Georgia Highway Express, Inc., supra,* at 71719. As part of the determination of a reasonable award, the Court must "explain the findings and reasons upon which the award is based, including an indication of how each of the twelve factors listed in *Johnson* affected his decision." *In re First Colonial Corporation of America,* 544 F.2d 1291, 1300 (5th Cir.), *cert. denied sub nom. Baddock v. American Benefit Life Insurance Company,* 431 U.S. 904 (1977)(citation omitted).*See also, Davis v. Fletcher,* 598 F.2d 469, 470-71 (5th Cir. 1979). Although each of the *Johnson* factors must be considered, and their effect on the award must be specified, the Court "should pay special heed to ... criteria numbers (1) the time and labor involved, (5) the customary fee, (8) the amount involved and the results obtained, and (9) the experience, reputation, and ability of counsel." *Copper Liquor, Inc. v. Adolph Coors Company,* 624 F.2d 575, 583 (5th Cir. 1980)(citation omitted). The Court will analyze the *Johnson* criteria out of sequence, first addressing the inquiries identified for emphasis by the *Copper Liquor* Court.

## TIME AND LABOR INVOLVED

In making this inquiry, the Court should consider the time sheets submitted by counsel and should weigh the hours claimed in light of the Court's own experience and observations in order to fashion a total time allowance which reflects the services rendered. *Johnson v. Georgia Highway Express, supra,* at 717; *McDonald v. Oliver,* 525 F.2d 1217, 1233 (5th Cir.), *cert. denied sub nom. International Longshoremen's Association v. McDonald,* 429 U.S. 817 (1976). The time expended on tasks related to the merits of the case should be distinguished from investigatory, clerical or other similar work which is not strictly legal. *See Neely v. City of Grenada,* 624 F.2d 547, 552 (5th Cir. 1980).

Since the inception of this litigation, three (3) attorneys have been involved in the preparation of the case. The total number of hours for which they have claimed compensation is 210.9, and the number of hours actually expended is 205.9. Nancy Hormachea was involved in the case prior to initiation of the appeal. She had submitted an affidavit reflecting the types of services she performed and the number of hours expended on each, totaling twenty-five (25) hours. Alan Vomacka has served as co-counsel for plaintiffs, and reflects a total of 27.4 hours. Patrick Wiseman has served as attorney of record for plaintiffs from the inception of the case through the present. He has submitted a detailed log of services rendered and the hours expended during the three (3) stages of this litigation. Mr. Wiseman has spend a total of 153.5 hours working on behalf of plaintiffs, and he has anticipated an additional five (5) hours through the time final judgment is entered herein.

The Court concludes that the total of 210.9 hours is reasonable and represents an efficient use of the attorneys' time. The logs submitted and reviewed by the Court reveal little, if any, duplication of effort. Further, the time records reflect only one hour expended by Mr. Wiseman on work that was not strictly legal, that is, on tasks which could have been completed by paralegal personnel. Accordingly, the Court finds no reason to reduce the number of hours on which to compute a reasonable attorneys' fee. The fee which the Court has determined is reasonable is calculated on the basis of 210.9 hours.

## THE CUSTOMARY FEE

The *Johnson* decision requires that the Court select an hourly rate which reflects the "customary fee for similar work in the community." *Johnson v. Georgia Highway Express, supra,* at 718. Based upon the Court's own experience and familiarity with the fees charged in this

legal community, the Court concluded that a current customary hourly fee in cases similar to the instant one ranges from $90.00 to $150.00 for a partner, from $60.00 to $100.00 for an associate, and from $30.00 to $40.00 for a paralegal or a law clerk. The application is calculated on an historic hourly rate for Ms. Hormachea and Mr. Vomacka. Ms. Hormachea has requested $75.00 per hour for 25 hours of work, and Mr. Vomacka has requested $60.00 per hour for 27.4 hours. In Mr. Wiseman's original application, filed in May 1979, he requested $75.00 per hour for his work. In his revised application, he has requested $90.00 per hour for all work done prior to September 1979, for the following reason: This Court previously had awarded a fee based on $75.00 per hour which was vacated by the Fifth Circuit, thus depriving plaintiffs of post-judgment interest they otherwise would have received. Thus, the original award has been reduced in value by loss of that interest as well as by inflation. The Court concludes that the request is reasonable, and that compensation of $90.00 per hour for the 30.75 hours of Mr. Wiseman's work prior to September 1979 is appropriate. Mr. Wiseman has requested an hourly rate of $100.00 for the time expended during the appeal and after remand. With the exception of one hour which Mr. Wiseman expended on paralegal work, the fee of $100.00 per hour is reasonable. He will be compensated at an hourly rate of $40.00 for the papalegal work.

## THE AMOUNT INVOLVED AND RESULTS OBTAINED

Plaintiffs sought injunctive and declaratory relief with regard to the First Amendment violation allegedly committed by defendants. As the Court previously has observed, each of the allegations specified in plaintiffs' complaint was addressed and corrected by defendants in the memorandum of October 27, 1978 in which Sawyer announced the lifting of the ban. Thus, plaintiffs were

completely successful in obtaining the results they sought by filing the lawsuit and the application for a temporary restraining order. The Court concludes that the benefits conferred on plaintiffs by reason of defendants removing restrictions on First Amendment activities are valuable, and this factor is emphasized in assessing the reasonableness of the fee to be awarded.

## THE EXPERIENCE, REPUTATION AND ABILITY OF COUNSEL

All counsel are experienced in the area of civil liberties. Their individual capabilities amply have been demonstrated throughout the pendency of this case, not only by reason of the results obtained, but also through the careful preparation and knowledge of legal precedent which are revealed in the documents which have been filed herein. The skill and experience of counsel are emphasized in determining the reasonableness of the fee to be awarded.

## THE NOVELTY AND DIFFICULTY OF THE QUESTIONS

Although the underlying issues herein were not ones of first impression in First Amendment litigation, the substantive area presents complex issues. In addition, the law constantly is evolving, thereby creating refinements and subtle distinctions which necessitate persistent vigilance and comprehensive understanding by attorneys. As the Court has explained hereinabove, plaintiffs' counsel demonstrated the ability to manage the kinds of challenges presented and the skill requisite to perform the legal services involved in this type of litigation.

## PRECLUSION OF OTHER EMPLOYMENT

This case did not preclude counsel from accepting other work; nor did the preparation time unduly restrict counsel from conducting other business. The cause, however, did require immediate action on plaintiffs' behalf in preparing plaintiffs' request for a temporary restraining order. In addition, the need to travel out of the State for oral argument and the time required for the evidentiary hearing in this matter did preclude counsel from conducting other business to a minor extent; therefore, this factor is given minimal emphasis in the determination of a reasonable fee.

## WHETHER THE FEE IS FIXED OR CONTINGENT

The fee arrangement between plaintiffs and their counsel is completely contingent upon the successful outcome in the instant cause. Plaintiffs were unable to pay their attorneys pursuant to a standard "fee per hour" arrangement based upon the per-hour billing rate of the individual attorney performing each representative service. Plaintiffs also were unable to provide a "fixed dollar fee" to counsel. This action was nonpecuniary, and therefore, a "percentage contingent fee" was not available, nor were the plaintiffs able to advance the costs in this matter. Rather, counsel relied solely upon the Attorney's Fee Award Act of 1976, 42 U.S.C. § 1988, for compensation for services rendered, and said arrangement must be considered favorably in this Court's determination of a reasonable fee.

## TIME LIMITATIONS IMPOSED BY CLIENT OR CIRCUMSTANCES

Inasmuch as plaintiffs' cause required an application for a temporary restraining order, plaintiffs' counsel initially were required to perform a substantial amount of work in a short period of time. Thereafter, however, no

unusual time constraints were imposed on counsel. The Court considers this factor as relevant but does not accord it much significance in determining the amount of the award.

## THE UNDESIRABILITY OF THE CASE

The initial proceeding in this case had no adverse economic impact on the legal practice of attorneys for plaintiffs, or upon their relations with the community or their contemporaries. The published assertions by defendants, however, that plaintiffs' counsel engaged in unethical behavior in instituting and maintaining this action are pertinent to this factor, and must be considered by the Court in calculating the fee to be awarded.

## THE NATURE AND LENGTH OF THE PROFESSIONAL RELATIONSHIP WITH THE CLIENTS

Nancy Hormachea and Alan Vomacka have maintained a long working relationship with the I.S.A., and have represented many individual Iranian students in various kinds of cases. Patrick Wiseman has not maintained a working relationship with plaintiffs or other Iranian students outside of the confines of the instant cause.

## AWARDS IN SIMILAR CASES

The fee which the Court has decided to award in this case is not unreasonable in comparison to the awards made in other cases. *See, e.g., Miller v. Carson,* 563 F.2d 741 (5th Cir. 1977); *Cruz v. Beto,*453 F. Supp. 905 (S.D. Tex. 1977), *aff'd,* 603 F.2d 1178 (5th Cir. 1979); *Guajardo v. Estelle,* 432 F. Supp. 1373 (S.D. Tex. 1977), *modified on other grounds,* 580 F.2d 748 (5th Cir. 1978).

Having reviewed the criteria prescribed by the *Johnson* Court, the Court concludes tha plaintiffs are entitled to an award of attorneys' fees in the amount of $19,001.50. Further, plaintiffs are entitled to compensation for their expenses in the amount of $1,276.60 Accordingly, the Court orders that plaintiffs are awarded a total of $20,278.10 for attorneys' fees and expenses.

## V. CONCLUSION

For the reasons stated herein, the Court orders that plaintiffs were the prevailing party in this cause. Further, plaintiffs are entitled to an award of attorneys' fees and expenses in the amount of $20,278.10, as well as interest on that amount, at the rate of nine percent (9%) per annum from the time judgment is entered until it is satisfied. Counsel for plaintiffs hereby are ordered to submit a proposed final judgment in conformity with, and incorporating by reference these Findings of Fact and Conclusions of Law within ten (10) days hereafter.

DONE at Houston, Texas, on this the 25th day of August, 1981.

/s/ Carl O. Bue. Jr.

Carl O. Bue, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

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| IRANIAN STUDENT ASSOCIATION, ET AL. | § | |
| | § | |
| V. | § | CIVIL ACTION |
| | § | |
| Dr. Granville M. Sawyer, ET AL. | § | NO. H-78-2055 |

**ORDER ON ATTORNEY'S FEES**

Pending before the Court is plaintiff's supplemental application for attorney's fees. Defendants have filed a response to the supplemental application wherein defendants question the jurisdiction of this Court to consider a claim for attorney's fees at this time. Defendants point out that following the entry of Final Judgment on October 16, 1981, defendants filed a notice of appeal on November 13, 1981. Accordingly, citing the general rule that the filing of a notice of appeal divests the district court of jurisdiction, defendants argue that the Court is without jurisdiction to consider the supplemental application for attorney's fees. After a careful review of the relevant case law, the Court is satisfied that it has jurisdiction to consider the merits of the instant fee application.

Although never having reviewed the issue now before the Court, the Fifth Circuit has determined that because of the nature of an award of attorney's fees pursuant to 42 U.S.C. §1988,

> a motion for attorney's fees [pursuant to 42 U.S.C. §1988] is unlike a motion to alter or amend a judgment. It does not imply a change in the judgment, but merely seeks what is due

> because of the judgment. It is, therefore, not governed by the provisions of Rule 59(e). *Cf.* Fed. R. Civ. P. 58 ("[e]ntry of the judgment shall not be delayed for the taxing of costs").

*Knighton v. Watkins*, 616 F.2d 795, 797 (5th Cir. 1980)(citations omitted). *See Jones v. Dealers Tractor and Equip. Co.*, 634 F.2d 180 (5th Cir. 1981). Accordingly, the Court in *Knighton v. Watkins, supra*, held that it was not an abuse of discretion for the district court to entertain a fee application although filed more than ten days after the entry of final judgment. *Id.* at 798. As to whether a district court can entertain a fee application pursuant to section 1988 after the filing of a notice of appeal, the Fifth Circuit has not provided the courts in this Circuit with any guidance. The Court need not venture upon unchartered seas, however, as there exists some case law in another circuit addressing the issue. Recognizing the interests of judicial economy, the Seventh Circuit Court of Appeals in *Terket v. Lund*, 623 F.2d 29 (7th Cir. 1980), held that district courts retain jurisdiction to consider attorney's fees motions even after an appeal has been filed. *Id.* at 34. At the district court level in *Terket*, the district court had granted defendants' motion for summary judgment. Within ten days after the court granted their motion for summary judgment, defendants moved for an award of attorneys' fees pursuant to section 1988. Twenty-one days after the filing of defendants' motion for attorneys' fees and within thirty days from the entry of the district court's order granting the motion for summary judgment, the plaintiff filed a notice of appeal. The district court then entered an order awarding attorneys' fees. In rejecting plaintiff-appellant's assertion that the district court was without jurisdiction to enter an order on attorneys' fees, the appellate court stated that because of the procedural implications of a motion for attorneys' fees,

> it is impractical to expect the district court to rule so quickly. Moreover, the opposing party would be empowered to prevent a decision simply by filing a notice of appeal promptly after judgment is entered. If the district court is unable to decide the attorneys' fees issue while the appeal is pending, it will often be forced to wait some months before the appeal is decided and then return to the case and attempt to recall the merits of the parties' positions, the reasonableness of the attorneys' time sheets, the competence of the attorneys, etc.—all matters with which the court would be familiar soon after its initial judgment. Furthermore, the district court's ruling on the attorneys' fees motion might then be appealed, requiring a similar duplication of effort, possibly by different judges, at the appellate level.

*Id.* at 34.

Despite the guidance offered by the case of *Terket v. Lund, supra,* the Court is fully cognizant that the jurisdictional issue before it is not free from doubt in this Circuit. Nevertheless, the Court is satisfied that it has jurisdiction to consider the fee application. In addition, the Court believes that the interest of judicial economy dictates that this Court decide the attorney's fees issue in order that all the issues presented in this cause are before the Circuit at the same time. If on appeal, the appellate court decides that this Court did not have jurisdiction to consider counsel's fee application, this Court would welcome a remand to consider again counsel's fee application. Having found that the Court has jurisdiction to consider the matters before it, the Court now turns to the merits of plaintiffs' supplemental application for attorney's fees.

In plaintiffs' supplemental application, plaintiffs' counsel seeks attorney's fees for the time which he has

spent in the representation of plaintiffs since the entry of the Court's of the Court's Findings of Fact and Conclusions of Law and Order on Attorneys' Fees. Specifically, plaintiffs' counsel has spent 22 hours in preparing and filing a proposed form of Final Judgment and a response to defendants' Motion to Set Aside Findings of Fact and Conclusions of Law. Consistent with the Court's earlier conclusion that plaintiffs prevailed in the instant cause, and accordingly, were entitled to attorneys' fees pursuant to 42 U.S.C. §1988 (1976), the Court hereby awards additional attorney's fees in the amount as specified below.

In the Court's Findings of Fact and Conclusions of Law entered on August 25, 1981, the Court went into considerable detail to support its award of attorneys' fees in the amount of $20,278.10 with interest. Although cognizant of the advantages of brevity in considering and determining the instant attorney's fees application, the Court is required by the Fifth Circuit to apply twelve specific criteria in making such a determination.[1] *See Johnson v. Georgia Highway Express,*

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1. The Court in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), listed the following 12 factors as bearing on the question of reasonable attorneys' fees:

(1) the time and labor required;
(2) the novelty and difficulty of the question;
(3) the skill requisite to perform the legal task properly;
(4) the preclusion of other employment by the attorney due to acceptance ofthe case;
(5) the customary fee;
(6) whether the fee is fixed or contingent;
(7) time limitations imposed by the client or the circumstances;
(8) the amount involved and the results obtained;
(9) the experience, reputation, and ability of the attorneys'
(10) the "undesirability" of the case;

*(footnote continued on following page)*

*Inc.*, 488 F.2d 714, 717-719 (5th Cir. 1974). *See also Sweeney v. Vindale Corp.*, 574 F.2d 1296, 1301 (5th Cir. 1978); *Fain v. Caddo Parish Police Jury*, 564 F.2d 707 (5th Cir. 1977). "In computing reasonable attorneys' fees the District Judge must explain the findings and the reasons upon which the award is based, including an indication of how each of the twelve factors in *Johnson* affected his decision.'" *Cooper Liquor, Inc. v. Adolph Coors Co.*, 624 F.2d 575, 581 (5th Cir. 1980), *citing, American Benefit Life Ins. Co. v. Baddock (In re First Colonial Corp. of America)*, 544 F.2d 1291, 1300 (5th Cir. 1977), *cert. denied sub nom.*, 431 U.S. 904 (1977). "What we require is not a meaningless exercise in parroting and answering of *Johnson's* twelve criteria, but some assurances that the Court has arrived at a just compensation based on appropriate standards." *Davis v. Fletcher*, 598 F.2d 469, 470-71 (5th Cir. 1979). Although all of the twelve factors must be considered, the Court will pay "special heed to *Johnson* criteria numbers (1) the time and labor involved, (5) the customary fee, (8) the amount involved and the results obtained; and (9) the experience, reputation and ability of counsel." *Cooper Liquor, Inc. v. Adolph Coors Co., supra, at 583.*

**(1) The Time and Labor Required**

In determining the reasonableness of attorney's fees the necessary starting point is to assess the amount of time spent by counsel on the case. *Johnson v. Georgia Highway Express, supra* at 717. In addition to the timesheet affidavits submitted by counsel, the Court should

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*(footnote continued from previous page)*

(11) the nature and length of the professional relationship with the client, and

(12) awards in similar cases.

488 F.2d at 717-19.

weigh the hours claimed by counsel in light of the Court's own experience and observations and fashion a total time allowance which rationally reflects the services rendered. *Id.; McDonald v. Oliver,* 525 F.2d 1217, 1233 (5th Cir. 1976), *cert. denied,* 429 U.S. 817 (1976). Moreover, the time expended by counsel directed towards the merits of the case should be distinguished from investigation, clerical work, and other work which, although performed by an attorney, could be performed by a layperson. *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp..,* 487 F.2d 161, 167 (3rd Cir. 1973); *Foster v. Boise-Cascade, Inc.,* 420 F. Supp. 674 (S.D. Tex. 1976), *aff'd,* 577 F.2d 335 (5th Cir. 1978). In addition, counsel should indicate whether the person performing each task is a partner, associate, or paralegal. *Johnson v. Georgia Highway Express, supra,* at 718-719.

In support of the supplemental application for attorney's fees, plaintiffs' counsel has submitted an affidavit detailing the nature of the services rendered by him in representing plaintiffs, the amount of time spent on such services, and the date on which such services were performed. According to his affidavit, counsel seeks an award of fees based upon having spent 17 hours in representing plaintiffs since the entry of the Court's Findings of Fact and Conclusions of Law.[2]

The Court has no difficulty in concluding that the hours claimed by counsel are reasonable and represent an efficient use of counsel's time in performing the task

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2. As the Court in its earlier Order on Attorneys' Fees awarded counsel attorney's fees for five hours of work which counsel anticipated performing in the case before the entry of Final Judgment, counsel seeks now only an award of attorney's fees for 17 hours rather than the 22 hours he has spent since the entry of the Court's previous Order on Attorneys' Fees.

described in the supplemental application and affidavit. Besides having the benefit of detailed time records, the Court is very familiar with the history of this litigation, the work performed by counsel on behalf of the plaintiffs, and the work product resulting on behalf of the plaintiffs, and the work product resulting from the tasks described in counsel's supplemental application and affidavit. Accordingly, the Court finds no reason to diminish the hours claimed by counsel.

**(2) Novelty and Difficulty of the Issues**

While the issues presented by defendants' motion to set aside the Court's Findings of Fact and Conclusions of Law and Order on Attorneys' Fees were not unusually complex, preparing an able response was time consuming and of the utmost importance in order to retain the ground plaintiffs had gained in the Court's Findings of Fact and Conclusions of Law and Order on Attorneys' Fees. Accordingly, the Court will take this factor into consideration in awarding counsel attorney's fees.

**(3) The Skill Requisite To Perform The Legal Services Properly**

The best method the Court can utilize in assessing the skill of plaintiffs' counsel did not appear before this Court at anytime during the period for which attorney's fees are now being sought, the Court has reviewed the work product filed with this Court during the relevant time period. Specifically, the Court has reviewed counsel's proposed Final Judgment, plaintiffs' response and supplemental response to defendants' motion to set aside the Court's Findings of Fact and Conclusions of Law and Order on Attorneys' Fees, and the fee application before the Court. After careful consideration, the Court finds that counsel for plaintiff ably and skillfully performed the legal services involved in this stage of the litigation.

### (4) The Preclusion of Other Employment by the Attorney Due to Acceptance of the Case

The representation of plaintiffs by counsel at this stage of the litigation did not preclude counsel from engaging in other employment. According, this factor will not be considered by the Court in determining a reasonable fee to be awarded counsel.

### (5) The Customary Fee

The Court in *Johnson v. Georgia Highway Express, Inc., supra,* declared that the district court should select an hourly rate which reflects the "customary fee for similar work in the community." *Id.* at 718. The Court emphasized also that the hourly rate should be varied by the district court in accordance with the type of work being considered. *Id.* at 717. Accordingly, trial work should command a higher rate than pretrial work. *See, e.g., Barth v. Bayou Candy Co.,* 379 F. Supp. 1201 (E.D. La. 1974); *United States v. Gray,* 319 F. Supp. 871, 875 (D.R.I. 1970).

In its earlier Order on Attorneys' Fees, the Court concluded that a customary hourly fee in cases similar to the instant case ranged from $90.00 to $150.00 per hour for a partner. The Court concluded further that Mr. Patrick Wiseman's requested hourly rate of $100.00 per hour was reasonable and should be the basis for an award of attorney's fees in this case. After carefully considering once again the customary legal fees charged in the Houston legal community, this Court can find no reason to modify in its earlier conclusions. Accordingly, the Court concludes once again that the hourly rate of $100.00 requested by Mr. Wiseman falls within the range of customary fees charged by attorneys in cases similar to the instant cause, and that $100.00 per hour is a reasonable hourly rate and will be the basis for an award of attorney's fees in the instant application.

**(6) Whether the Fee is Fixed or Contingent**

As the Court stated in its earlier Order, counsel undertook the representation of plaintiffs on a contingent basis, with counsel relying solely upon the Attorney's Fee Award Act of 1976, 42 U.S.C. §1988 (1976), for compensation for the legal services which he rendered.

**(7) Time Limitation Imposed By The Client or the Circumstances**

The services rendered by counsel in the performance of the tasks described in counsel's affidavit were not performed under time constraints. Accordingly, the Court considers this factor irrelevant in determining the amount of the award.

**(8) The Amount Involved and the Results Obtained**

As the supplemental application for attorney's fees now before the Court seeks only an award of fees for tasks performed after the entry of the Court's Findings of Fact and Conclusions of Law and Order on Attorneys' Fees, this factor is of far less significance than in the Court's previous Order. Accordingly, the Court will afford this factor less weight than it did in its previous Order on Attorneys' Fees.

**(9) The Experience, Reputation, and Ability of the Attorneys**

The Court has presided over all phases of this case since its inception in 1978, and is thoroughly familiar with the litigation and the extent and quality of services rendered by counsel for plaintiffs. As stated in its earlier Order, Plaintiffs' counsel is experienced in the area of civil liberties. As evidenced by the record and the benefits conferred on plaintiffs, the Court finds that plaintiffs have been ably served by their counsel who

skillfully met the substantive and procedural challenges presented in this case. At all times, counsel displayed a professional level of expertise in the substantive areas. Accordingly, the Court places considerable emphasis on this factor in determining an award.

**(10) The Undesirability of the Case**

Consistent with its earlier findings, the Court finds once again that the proceedings at this stage of the litigation have caused no adverse economic impact on plaintiffs' counsel's legal practice, or upon counsel's relationship with the community or his contemporaries. In addition, however, the Court finds that the published assertions by defendants that plaintiffs' counsel engaged in unethical behavior in instituting and maintaining this action remain pertinent, and must be considered by the Court in calculating the award of attorney's fees.

**(11) The Nature and Length of the Professional Relationship with the Client**

Aside from his representation of plaintiffs in the instant cause, Mr. Wiseman has not maintained a working relationship with plaintiffs or other Iranian students.

**(12) Awards in Similar Cases**

Once again, the Court finds that the amount to be awarded plaintiffs' counsel is not unreasonable in comparison to the awards made in other cases. *See, e.g., Miller v. Carson,* 563 F.2d 741 (5th Cir. 1977); *Cruz v. Beto,* 453 F. Supp. 905 (S.D. Tex. 1977), *aff'd,* 603 F.2d 1178 (5th Cir. 1979); *Guadjardo v. Estelle,* 432 F. Supp. 1373 (S.D. Tex. 1977), *modified on other grounds,* 580 F.2d 748 (5th Cir. 1978).

## Award of Attorney's Fees

After taking all of the relevant factors into consideration, and affording the appropriate weight to factors (1), (5), (8), and (9), the Court finds that plaintiffs' counsel is entitled to reasonable attorney's fees in the total amount of $1,700.00, as well as interest on that amount at the rate of nine percent (9§) annum until judgment is satisfied.

DONE at Houston, Texas, on this the 12th day of January, 1982.

/s/ Carl O. Buo, Jr.
Carl O. Buo, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

| | | |
|---|---|---|
| Iranian Student Association, Et Al, | § | |
| | § | |
| *Plaintiffs* | § | Civil Action No. H-78-2055 |
| | § | |
| Dr. Granville M. Sawyer, President, Texas Southern University, ET AL, | § | |

## FINAL JUDGMENT

This action came on for evidentiary hearing, before the Court, on the issue of attorneys' fees on August 4, 1981 as per the mandate of the Fifth Circuit Court of Appeals in *Iranian Student Association v. Sawyer,* 639 F.2d 1160 (5th Cir. 1981). As required this Court, in order to determine the prevailing party in this action, took under consideration the related issues of whether the Plaintiffs' actions in filing their lawsuit was groundless, frivolous or unreasonable, and whether Plaintiffs' decision to lift the challenged ban on First Amendment activities on the Texas Southern University campus.

On August 5, 1981 this Court entered its *Bench Ruling* (incorporated herein by reference) and subsequently, on August 25, 1981, its *Findings of Fact and Conclusions of Law And Order On Attorneys' Fees* (incorporated herein by reference) holding that Plaintiffs were, indeed, the prevailing parties and directing the entry of judgment in favor of the Plaintiffs and against the Defendants. In conformity with that holding the Court hereby enters its *Final Judgment.* Therefore, it is

ORDERED, ADJUDGED and DECREED that Plaintiffs are the prevailing party in this cause.

IT IS FURTHER ORDERED that counsel for Plaintiffs are entitled to an award of reasonable attorneys' fees and expenses in the amount of Twenty Thousand Two Hundred Seventy-Five and 10/100 ($20,275.10) Dollars calculated in the following manner:

| | |
|---|---|
| J. Patrick Wiseman | $15,482.50 |
| Nancy Hormachea | 1,875.00 |
| Alan Vomacka | 1,641.00 |
| Expenses | 1,276.60 |
| TOTAL | $20,275.10 |

These amounts are reasonable as more fully set forth in this Court's August 25, 1981 *Findings of Fact and Conclusions of Law and Order on Attorneys' Fees.*

IT IS FURTHER ORDERED that interest, at the rate of nine (9%) percent per annum, shall run upon the total award of Twenty Thousand Two Hundred Seventy-Five and 10/100 ($20,275.10) Dollars from the date this Judgment is entered.

IT IS FURTHER ORDERED that this Judgment shall run against the Defendants in their official capacity.

FINALLY, IT IS ORDERED that, in all other respects, this Court's *Final Judgment* entered August 10, 1979 is reaffirmed.

THIS IS A FINAL JUDGMENT.

DONE at Houston, Texas, this 16th day of October, 1981.

/s/ Carl O. Bue, Jr.

Carl O. Bue, Jr.
United States District Judge

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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No. 81-2458

Summary Calendar

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IRANIAN STUDENT ASSOCIATION,
PEREYDOUN KIANI-ZEINABAD,
individually and on behalf of
all others similarly situated,
Plaintiffs-Appellees,

versus

DR. GRANVILLE M. SAWYER, ET AL.,
Defendants-Appellants.

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Appeal from the United States District Court
for the Southern District of Texas

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SEPTEMBER 13, 1982

Before GEE, RANDALL, and TATE, Circuit Judges. Placed on Summary Calendar. Submitted as Final Judgement.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 81-2458

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IRANIAN STUDENT ASSOCIATION,
PEREYDOUN KIANI-ZEINABAD,
individually and on behalf of
all others similarly situated,

*Plaintiffs-Appellees,*

versus

DR. GRANVILLE M. SAWYER,
ET AL,

*Defendants-Appellants.*

Appeal from the United States District Court for the
Southern District of Texas

ON SUGGESTION FOR REHEARING EN BANC

(Opinion 9/13/82), 5 Cir., 198__,_____F.2d_____)
(October 12, 1982)

Before GEE, RANDALL and TATE, Circuit Judges.

PER CURIAM:
( X ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Rule 35, Fedeal Rules of Appellate Procedure; Local Fifth Circuit Rule 16), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

_____

United States Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

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| Iranian Student Association; Pereydoun Kiani-Zeinabad, Individually and on behalf of all others similarly situated, | § | |
| *Plaintiffs,* | § | CIVIL ACTION |
| V. | § | |
| | § | NO. H-78-2055 |
| Dr. Granville M. Sawyer, President, Texas Southern University, Individually and in his official capacity; ET AL, | § | |
| *Defendants.* | § | |

**ORDER**

On October 26, 1978, plaintiffs filed this lawsuit against defendants pursuant to 42 U.S.C. §§ 1983, 1985, 1986 and 1988 (1974) seeking injunctive protection against alleged violations of their First Amendment rights. On October 27, 1978, the attorneys for the parties met and discussed plaintiffs' grievances and following this meeting plaintiffs withdrew their request for injunctive relief but continued to seek an award of attorney's fees. On April 30, 1979, at an oral motion conference in the Court's chambers counsel for the parties argued their respective positions on the attorney's fees issue and for the reasons set forth below, the Court orally ruled that plaintiffs are entitled to attorney's fees.

The Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988 (1976), provides:

> "In any action or proceeding to enforce a provision of sections 1981, 1983, 1980, 1985 and 1986 ... or any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or Title VII of the Civil Rights Act of 1964, the Court, in its descretion may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

In *Brown v. Culpepper*, 559 F.2d 274 (5th Cir. 1977), the Fifth Circuit Court of Appeals analyzed the legislative history of the Attorney's Fees Awards Act and concluded that the standards for attorney's fees under this act should be the same as those applied under the attorney's held that "the defendant's conduct, be it negligent or intentional, in good faith or bad, is irrelevant to an award of attorney's fees." 559 F.2d at 278. Thus, the court concluded, a prevailing party should ordinarily recover attorney's fees unless special circumstances would render such an award unjust. Furthermore, the court rejected the contention of defendants that because the parties settled the litigation by voluntary agreement the plaintiffs were not "prevailing parties." Quoting the legislative history, the court stated:

> "[F]or purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief."

*Id.* at 277.

In the recent case of *Nadeau v. Helgemoe*, 581 F.2d 275 (1st Cir. 1978), the First Circuit, similarly faced with a situation in which the parties settled the case without a final judicial determination of whether defendant deprived plaintiffs of their constitutional rights, set forth a two-pronged test which a plaintiff must satisfy in order to be entitled to attorney's fees under the Attorney's Fees Awards Act of 1976: (1) plaintiff must show casual relationship between the filing of the suit and the actions of defendants which improved their condition; and (2) plaintiff must demonstrate that the actions of defendants were not merely gratuitous, but were required by law. Defendants vigorously argue that plaintiffs cannot satisfy either prong in the instant case.

In order to resolve the question of the casual connection between the filing of this suit and the termination of the complained of conduct, it is necessary to review the chronology of relevant events. As the court stated in *Nadeau:*

> "[W]e consider the chronological sequence of events to be an important, although clearly not definitive factor, in determining whether or not defendant can be reasonably inferred to have guided his actions in response to plaintiff's lawsuit. This is particularly true where the evidence relevant to the causes of defendant's behavior is under defendant's control and not easily available to plaintiff."

581 F.2d at 281

In a sworn affidavit submitted to the Court, Patrick Wiseman, co-counsel for plaintiffs, outlined the chronology of events which led to the filing of the suit:

> "I personally contacted in-house counsel for the University on October 25, 1978 to inform him

of Plaintiffs' intention to undertake this action absent an immediate secession [sic] of the acts complained of herein. On October 26, 1978, I also contacted Nathan Johnson, whom I had been informed was the Assistant Texas Attorney General assigned to represent Texas Southern University. I indicated Plaintiffs' intention to proceed with legal action absent immediate and positive action on the part of the Defendants. Said Nathan Johnson was unable to provide me with such assurance. He did agree, however, to counsel with his clients to determine their position on the matter.

"By return telephone call on even date, Mr. Johnson indicated that, the ban on demonstrations would not be immediately lifted. Rather, he suggested that such ban would possibly be lifted the next day.

"Plaintiffs and their counsel were fully aware of Defendants repeated and presistant [sic] statements that the ban was indefinite. Neither Plaintiffs nor their counsel were ever given firm assurances that the ban would be promptly lifted. Plaintiffs' never questioned that the ban on demonstrations would be eventually lifted on some arbitrary date fixed by Defendants.

"Believing that a denial of First Amendment rights causes irreparible [sic] harm *per se* Plaintiffs proceeded with this action."

Nathan Johnson, counsel for defendants, contends in his sworn pleading that he told Wiseman on October 26 that the decision had already been made to lift the ban the following day and that in any event since the actions were taken pursuant to TEX. EDUC. CODE ANN. tit. 3 § 51.231 *et seq.* (1978), they would end by operation of

law the following day. The Court finds Wiseman's version of events more plausable, and concludes that no firm representation was made as to when the ban would be lifted.

Furthermore, defendants' argument that the ban was invoked pursuant to §51.231 *et seq.* and thus would have expired by operation of law on October 27, fourteen days after it was instituted, is without merit. Section 51.232 authorizes the chief administrative officer of a state supported institution of higher education to withdraw consent for any person to remain on campus "whenever there is reasonable cause to believe that the person has willfully disrupted the orderly operation of the campus or facility and that his presence on the campus or facility will constitute a substantial and material threat to the orderly operation of the campus or facility." In order to utilize this authority the chief administrative officer must follow specifically delineated notice and hearing procedures and the revocation of consent may last only fourteen days.

In the instant case defendants contend that the actions taken of banning demonstations and suspending campus privilages of Iranian student organizations are less severe that revocation of consent to remain on campus and thus are implicitly authorized by §51.232. Such an argument is not persuasive, and, furthermore, no attempt was made to comply with the notice and hearing provisions of the statute. In addition, the memorandum which announced the ban on demonstrations specifically stated that the ban was to run indefinitely. Thus, there is no basis for concluding that the restrictions implemented by defendants were pursuant to §51.232 and would have expired at the end of fourteen days. These factors, plus the chronology of events, convince the Court that there was a causal connection between the filing of the lawsuit and the cessation of the challenged actions.

In the alternative, defendants argue that even if the Court determines that plaintiffs' suit precipitated the decision to lift the ban, such decision was not mandated by law and the plaintiffs thus fail to satisfy the second prong of the *Nadeau* test. Faced with a similar situation in *Nadeau,* the Court of Appeals rejected the suggestion the the district court conduct the very trial the consent decree was designed to avoid in order to determine whether the actions taken by defendants were required by law and held instead that the proper test was

> "whether if plaintiffs had continued to press their claims under traditional constitutional theory, their action could be considered 'frivilous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so.' *Christiansburg Garment Co. v. E.E.O.C.,* 434 U.S. 412, 422, 98 S.Ct. 694, 701, 54 L.Ed.2d 648 (1978)."

Plaintiffs challenged the actions of defendants as violative of their First Amendment rights on numerous grounds. It is fundamental that

> "[a]ny prior restraint on expression comes to this Court with a 'heavy presumption' against its validity ... [defendant] carries a heavy burden of showing justification for the imposition of such a restraint."

*Organization For A Better Austin v. Keefe,* 402 U.S. 415, 419 (1971). Without trying plaintiffs' case on the merits and considering the applicable case law and pertinent facts of this case, the Court concludes that the challenges raised against the actions of defendants are not "frivilous, unreasonable or groundless." Accordingly, plaintiffs have satisfied the second part of the *Nadeau* test and are therefore entitled to an award of attorney's fees absent a showing of special circumstances

which would render such an award unjust. No such circumstances exist and the Court hereby grants plaintiffs' attorney's fees incurred in the prosecution of the instant case.

On May 9, 1979, plaintiffs filed an affidavit and memorandum documenting time spent on this case and analyzing the numerous factors set out in the seminal attorney's fees case of *Johnson v. Georgia Highway Express,* 488 F.2d 714 (1972). Defendants are hereby ordered to respond within fourteen days setting forth in detail their position on what constitutes reasonable attorney's fees in the instant case.

DONE at Houston, Texas, this 18th day of May, 1979.

/s/ Carl O. Bue, Jr.

Carl O. Bue, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

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| IRANIAN STUDENT ASSOCIATION, ET AL, | § | |
| | § | |
| *Plaintiffs,* | § | |
| | § | CIVIL ACTION |
| V. | § | |
| | § | NO. H-78-2055 |
| Dr. Granville M. Sawyer, President, Texas Southern University, ET AL, | § | |
| | § | |
| *Defendants.* | § | |

**ORDER**

On May 18, 1979, the Court entered a written order detailing its conclusion that plaintiffs were prevailing parties within the meaning of the Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (1976), and ordering defendants to respond to plaintiffs' requested fee amount. Subsequently, defendants filed two additional memoranda challenging the propriety of the Court's May 18 order seeking an evidentiary hearing on the issue of whether the actions taken by defendants in response to the filing of the lawsuit were required by law. Plaintiffs, in turn, filed responsive memoranda urging the correctness of the May 18 order and denying the necessity for an evidentiary hearing.

The Court has reviewed the arguments and authorities presented by the parties and concludes that the facts and circumstances of this case do not necessitate an evidentiary hearing on the question of whether the actions taken by defendants in lifting the ban on student demonstrations were legally mandated.

As support for their argument that they are entitled to an evidentiary hearing, defendants cite *Sargeant v. Sharp*, 579 F.2d 645 (1st Cir. 1978), wherein the court reversed and remanded a district court order summarily denying an award of attorney's fees to a plaintiff in a civil rights case who successfully obtained a consent judgment. In ordering a hearing on remand the court stated:

> "In holding that a hearing is required in the case at bar, we do not decide whether a formal evidentiary hearing is required in every instance where an award of attorney's fees is contested. But we do hold that the summary disposition of the threshold question of entitlement in an informal unrecorded settlement conference followed by issuance of an order denying counsel fees without an adequate statement of the reasons for the order does not meet minimum standards of procedural fairness and regularity .... (Citations omitted) Nor does an order issued without a deliberate articulation of its rationale, including some appraisal of the factors underlying the court's decision, allow for a disciplined and informed review of the court's discretion."

*Id.* at 647.

In *Sargeant* the district court failed to state in its order whether it considered the possible application of the common law "bad faith" standard for the award of attorney's fees and did not give its reasons "for departing from the standard controlling the discretion of the court in civil rights actions, i.e., that a successful plaintiff 'should ordinarily recover an attorney's fees unless special circumstances would render such an award unjust.'" (Footnote omitted) *Sargeant, id.* Such circumstances do not exist in the case *sub judice*, since the

Court's May 18 order granting the plaintiffs' attorney's fees is consistent with the general rule favoring the award of attorney's fees to successful plaintiffs.

The only issue upon which defendants seek a hearing is the question of whether their actions in terminating the ban on demonstrations were required by law. As discussed by the Court in its May 18 order, prior restraints on freedom of expression are constitutionally suspect and carry a heavy presumption of invalidity. Furthermore, the Court discussed in detail its reasoning in rejecting defendants' argument that the ban was properly invoked pursuant to TEX. EDUC. CODE ANN. tit. 3 § 51.231 *et seq.* (1978). No additional legal grounds in support of the ban have been advanced by defendants and no factual questions relevant to resolution of this issue have been raised. Accordingly, the Court concludes that its May 18 order is correct and that no further evidentiary hearing is necessary.

Plaintiffs have submitted a thorough and well-documented memorandum in support of their requested attorney's fees and costs pursuant to the following standards enunciated in *Johnson v. Georgia Highway Express,* 488 F.2d 714 (5th Cir. 1974):

1. The time and labor required;
2. The novelty and difficulty of the questions presented;
3. The skill requisite to properly perform the legal services;
4. Preclusion of other employment by the attorney due to acceptance of the case;
4. Preclusion of other employment by the attorney due to acceptance of the case;
5. The customary fee;
6. Whether the fee is fixed or contingent;
7. Time limitations imposed by the client;
8. The amount involved and the results obtained;

9. The expertise, reputation and ability of the attorneys;
10. The undesirability of the case;
11. The nature and length of the professional relationship with the clients; and
12. Awards in similar cases.

The defendants have contested neither the total time of 55.75 hours claimed to have been expended on the case nor the hourly rate of $75.00 requested. Without separately addressing each of the twelve criteria listed above, the Court concludes that the fee requested is consistent with *Johnson v. Georgia Highway Express* and is reasonable under the circumstances of the present case. *See also Foster v. Boise-Cascade, Inc.*, 420 F. Supp. 674 (S.D. Tex. 1976), *aff'd*, 577 F.2d 335 (5th Cir. 1978). Therefore, the Court hereby orders payment of $4,181.25 plus costs to plaintiffs. Plaintiffs seek in addition typing, Xerox, postage and telephone expenses incurred by counsel totaling $100.00. The Court concludes that the attorney's fees award adequately covers these expenditures and that no additional award is warranted.

Resolution of the attorney's fees question disposes of all pending issues in the case; accordingly, this action is hereby dismissed.

DONE at Houston, Texas this 10th day of August, 1979.

/s/ Carl O. Bue, Jr.

Carl O. Bue, Jr.
United States District Judge

IRANIAN STUDENTS ASSOCIATION
et al., Plaintiffs-Appellees,

v.

Dr. Granville M. SAWYER, President,
Texas Southern University et al.,
Defendants-Appellants.

No. 79-3333.

United States Court of Appeals,
Fifth Circuit.
Unit A

March 16, 1981

University officials appealed from order of the United States District Court for the Southern District of Texas, Carl O. Bue, Jr., J., which awarded attorney fees to plaintiffs in civil rights action. The Court of Appeals, Ainsworth, Circuit Judge, held that it was error to deny university's request for evidentiary hearing on issue of which side was the prevailing party where the university alleged that it had taken the action which effectively mooted the case prior to learning that the lawsuit would be filed.

Vacated and remanded.

1. Federal Civil Procedure - 2737
Prevailing parties are entitled to reasonable attorneys fees for vindicating the public interest by enforcing fundamental constitutional rights unless special circumstances render and award unjust. 42 U.S.C.A. § 1988.

2. Federal Courts - 830
Once attorney fees are awarded in a civil rights action,

reviewing court can reverse only if there has been an abuse of discretion. 42 U.S.C.A. § 1988.

3. Federal Civil Procedure - 2737.5

Attorneys fees awards are available to those parties who prevail in actions concerning violations of First Amendment rights. 42 U.S.C.A. §1988; U.S.C.A. Const. Amend. 1.

4. Federal Civil Procedure - 2737

Attorney fees may be awarded without the grant of formal judicial relief and a party may prevail and be entitled to attorney fees even when remedial action by the defendant effectively moots the controversy subsequent to the filing of the lawsuit. 42 U.S.C.A. § 1988.

5. Federal Civil Procedure - 2737

If litigation has been rendered moot, record must reflect ample evidence of link between the litigation and the actions taken by the defendant before the district court can award attorney fees; there must be evidence which shows the existence of a causal relationship between the lawsuit and the relief received; that relationship must be more than simple knowledge that litigation may occur. 42 U.S.C.A. § 1988.

6. Federal Civil Procedure - 2737

Chronological sequence of events is a factor to be considered in determining whether the plaintiffs' lawsuit resulted in the relief obtained, but chronological sequence of events is not definitive with respect to the plaintiff's entitlement to an award of attorney fees. 42 U.S.C.A. § 1988.

7. Federal Civil Procedure - 2737.5

If decision of university president to lift ban on demonstrations was made before he became aware of lawsuit challenging that ban, the litigation was neither a substantial factor nor a significant catalyst in ter-

minating that ban and the plaintiffs would not be entitled to an award of attorney fees. 42 U.S.C.A § 1988.

8. Federal Civil Procedure - 2742

It was error on the part of the district court to deny defendants an opportunity, which they formally requested, for a full evidentiary hearing on the merits of the case as to which party was the prevailing party with respect to an award of attorney fees in civil rights action where defendants claimed that they had decided to take the action which effectively mooted the case before learning that the lawsuit would be filed. 42 U.S.C.A. § 1988.

9. Federal Civil Procedure - 13.17

Award of attorney fees may be made in civil rights action if the court is sure that the litigation was not frivilous or unreasonable or groundless and that the plaintiff did not continue to litigate after it clearly became so. 42 U.S.C.A. § 1988.

10. Federal Civil Procedure - 2737

If court concludes that litigation was unnecessary or frivilous, defendants are entitled to reasonable attorney fees. 42 U.S.C.A. § 1988.

Appeal from the United States District Court for the Southern District of Texas.

Before AINSWORTH, CHARLES CLARK and WILLIAMS, Circuit Judges.

AINSWORTH, Circuit Judge:

This is an appeal from a district court order granting appellees' motion for attorneys' fees pursuant to 42 U.S.C. § 1988, the Civil Rights Attorneys' Fees Awards Act of 1976. Appellees, the Iranian Students Association of Texas Southern University and an individual member, brought this action against the President, Dr.

Granville M. Sawyer, and the Board of Regents of Texas Southern University, challenging a ban on campus demonstrations and marches as violative of the first and fourteenth amendment rights.[1] Appellants charge that the district court abused its discretion when it refused to grant an evidentiary hearing on the attorneys' fees issue to determine whether appellees were prevailing parties in both fact and law.[2] We find the record inadequate to justify the court's conclusion that appellees were the prevailing parties and accordingly vacate and remand for an evidentiary hearing.

## I.

On October 14, 1978, Dr. Sawyer issued a ban on marches and demonstrations at Texas Southern University in response to a campus disturbance the previous day which required assistance from the Houston Police Department to restore order.[3] In addition, Dr. Sawyer directed school officials to take the necessary steps to dismiss the leaders of the disturbance and he also established a University panel of inquiry to review the incident and recommend appropriate action.

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1. Appellees brought the suit pursuant to 42 U.S.C. §§ 1983, 1985, 1986 and 1988 on behalf of themselves and all others similarly situated. In addition to temporary restraining order and injunctive relief, appellees also sought damages, costs and attorneys' fees.

2. Appellants also contend the court erred in not holding the suit was frivolous. Accordingly, they seek a remand to show why they are the parties entitled to attorneys' fees.

3. According to a memorandum issued by Dr. Sawyer on October 27, 1978, the disturbance on October 13 was the second incident within a period of four weeks in which protesting Iranian students had disrupted the campus by threats of violence. In the month of September, rallies among the Iranian students had disturbed classes, blocked traffic on campus, and had so threatened violence to a recruiter for the Central Intelligence Agency that it was necessary to fire shots to disperse the "mob," Rec. at 85.

*(footnote continued on following page)*

Appellees filed this suit on October 26, 1978 alleging that the ban was unconstitutional in that it deprived them of their right to freedom of speech, assembly, and petition. The next day, October 27, Dr. Sawyer announced acceptance of the preliminary report of the panel of inquiry and rescinded the October 14 ban on demonstrations. That same day, attorneys for the parties met to discuss the actions that had been taken. Following the meeting, appellees withdrew their request for injunctive relief but continued to seek an award of attorneys' fees.

Appellants filed an answer to appellees' complaint one week after they lifted the ban. In the answer, appellants alleged that the decision to rescind the ban was made before the University became aware of the lawsuit. Contending the action was moot, appellants requested the court to grant judgment and attorneys' fees for defendants.

In response to appellants' answer, appellees filed a memorandum of law on attorneys' fees in which they recognized that the actions of Dr. Sawyer on October 27 substantially complied with the requests sought in their complaint. Therefore, appellees contended that since compliance came "as a direct result of this litigation," they were entitled to attorneys' fees as prevailing parties. Rec. at 80.

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*(footnote continued from previous page)*

The incident on October 13 occurred during a speech on campus by Chip Carter, son of President Jimmy Carter. Appellants state that protesting Iranian students blocked the entrance to the building where the speech was being given and one student was physically struck for refusing to join the protest. Rec. at 69. Noting that two other student groups had indicated they would oppose the actions of the Iranian protesters, Dr. Sawyer found it necessary to request help from the Houston Police Department to eliminate the threat of violence. Rec. at 84.

Appellants respond in their own memorandum on attorneys' fees by arguing the filing the suit was unnecessary. According to appellants, they were informed through the Texas Attorney General on October 26 of appellees' intention to file suit. Thereupon, the University notified counsel for appellees that the decision to lift the ban had already been made. Rec. at 88. Appellants contended that "[w]ith full knowledge that the ban was being lifted, Plaintiffs filed the present action." *Id.* They further asserted that they met with counsel for appellees the following day, October 27, only as a matter of courtesy and never agreed that any rights of appellees had been violated. They thereafter lifted the ban in accord with their earlier decision and not because of a settlement or the pending litigation. Appellants contended that because appellees were aware of the decision to rescind the ban, the lawsuit was frivolous and filed solely with the intent of obtaining attorney's fees. Therefore, appellants reasserted that they were the rightful parties entitled to attorneys' fees.

Finally, appellees filed a reply to appellants' memorandum in which counsel for appellees contended he was never assured that ban was to be rescinded and that the University's decision was indeed precipitated by the threat of litigation. In a sworn affidavit, counsel for appellees asserted that in a telephone conversation with defense counsel on October 26, he was told the University might lift the ban the following day. However, he further asserted that appellees were never "given firm assurances that the ban would be promptly lifted." Rec. 102.

On April 30, 1979, the district court held a chambers conference with counsel for each party to discuss the issue of attorneys' fees. No stenographic tanscript of the conference was made, nor was there an evidentiary hearing in any sense of the word. It was apparently only a conference between the district judge and counsel. After

noting the conflict in positions, the district judge found the assertions of counsel for appellees "more plausable, and conclude[d] that no firm representation was made as to when the ban would be lifted." Rec. at 124. Accordingly, the district court held that appellees were prevailing parties as a matter of fact because the decision to lift the ban was precipitated by the lawsuit. Additionally, the court held that since the lawsuit did not represent a frivolous claim, appellees were also prevailing parties as a matter of law.

## II.

[1-4] Under 42 U.S.C § 1988, prevailing parties are entitled to reasonable attorneys' fees for vindicating the public interest by enforcing fundamental constitutional rights unless special circumstances render and award unjust. *Riddell v. National Democratic Party*, 624 F.2d 539, 543 (5th Cir. 1980). Once fees are awarded by the district court, we can reverse only if there has been an abuse of discretion by the court. *Robinson v. Kimbrough*, 620 F.2d 468, 470 (5th Cir. 1980). It is Clear that section 1988 makes attorneys' fees awards available to those parties who prevail in actions concerning violations of first amendment rights. *Universal Amusement Co. v. Vance*, 587 F.2d 159, 172 n. 25 (5th Cir. 1978)(*en banc*). *See, e.g., Iranian Students Ass'n v. Edwards*, 604 F.2d 352, 353 (5th Cir. 1979)(suit under first amendment to enjoin interference with student demonstration at a state university). We have also recognized that attorneys' fees may be awarded without granting formal judicial relief. *Robinson v. Kimbrough, supra* at 475; *Knighton v. Watkins*, 616 F.2d 795, 798 (5th Cir. 1979); *Criterion Club v. Board of Comm'rs*, 594 F.2d 118, 120 (5th Cir. 1979); *Brown v. Culpepper*, 559 F.2d 274, 277 (5th Cir. 1977). Moreover, a party may prevail and be entitled to attorneys' fees when remedial action by the defendant effectively moots the controversy subsequent

to filing of the lawsuit. *Doe v. Marshall,* 622 F.2d 118, 120 (5th Cir. 1980); *Robinson v. Kimbrough, supra* at 475; *Criterion Club v. Board of Comm'rs, supra* at 120.

[5] Although the litigation has been rendered moot by appellees' actions, the record must reflect amply evidence of a link between the litigation and appellees' action before the district court can award attorneys' fees under section 1988. There must be evidence that shows the existence of a causal relationship between the lawsuit and the relief received. This relationship must be more than simple knowledge that litigation may occur. In *Robinson v. Kimbrough, supra,* we adopted a test focusing upon the catalytic nature of the lawsuit. *See also Coen v. Harrison County School Board, — F.2d — slip opl 4022 (5th Cir. 1981)(No. 79-3970, February 23)(lawsuit must be a major factor in obtaining relief); Brown v. Culpepper, supra* (lawsuit was necessary factor in obtaining relief). There we stated that plaintiffs may recover under section 1988 if they can show "their lawsuit was a sifgnificant catalytic factor in achieving the primary relief sought through litigation despite failure to obtain formal judicial relief." *Robinson v. Kimbrough, supra* at 478.

[6-10] Applying the catalyst test to the record in the present case is difficult. The district court, in reliance upon *Nadeau v. Helgemoe,* 581 F.2d 275 (1st Cir. 1978), found a causal connection by reviewing the chronology of relevant events and apparently weighing the plausibility of each counsel's version of event. While the chronological sequence of events is a factor to consider, we agree with the First Circuit that it is clearly not definitive. *Id.* at 281. *See Robinson v. Kimbrough, supra* at 476 (list of factors to consider in awarding attorneys' fees). In addition, although the district court found appellants' argument more "plausable," the contradicting pleadings and affidavits are insufficient evidence upon which the court can make such a determination. Accor-

ding to appellants, Dr. Sawyer based his decision on the report of the panel of inquiry and in no way was influenced by the lawsuit. If Dr. Sawyer's decision was made before the University administration became aware of appellees' lawsuit, the litigation was neither a substantial factor nor significant catalyst in terminating the campus ban on demonstrations.[4] However, the instant record is inadequate to permit review of the district court's decision. It was clearly error on the part of the district court to deny appellants an opportunity, which they formally requested, for a full evidentiary hearing on the merits of the case as to which party was the prevailing party.[5] We therefore conclude the district court erred in failing to hold an evidentiary hearing on whether appellees' lawsuit was a significant catalyst to the rescission of the ban on campus demonstrations at Texas Southern University and remand for that purpose, and therefore to determine which side was the prevailing party in the case.[6]

VACATED AND REMANDED

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4. There are cases in which attorneys' fees were denied where plaintiffs' efforts were not contributing factors in obtaining the ultimate relief requested. *E.g., Cicero v. Olgiati,* 473 F.Supp. 653, 655 (S.D.N.Y.1979)(plaintiffs not awarded fees since they had no meritorious claim and record inconclusive on influence of lawsuit on defendants' action). *See Riddell v. National Democratic Party,* 624 F.2d 539, 544 (5th Cir. 1980)(listed three cases where lawsuit did not contribute to result).

5. Following the district court's order awarding attorneys' fees to appellees, appellants filed a motion to set aside the order in which they requested an evidentiary hearing. Subsequently, after reviewing memoranda from both parties, the district court denied appellants' request for an evidentiary hearing.

6. Appellants also contend that appellees cannot be held to have prevailed since an adjudication on the merits of the case would have revealed the justification of appellants' actions. Although it is true

*(footnote continued on following page)*

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no fees could be awarded had the court ruled no rights were violated, it would be ineffectual to require the court to hear the complete litigation on a matter already moot. It is enough to meet the legal requirement to be sure the litigation is not "frivilous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so." *Christiansburg Garment Co. v. E.E.O.C., 434 U.S. 412, 422, 98 S.Ct. 694, 701, 54 L.Ed.2d 648 (1978). See Nadeau v. Helgemoe,* 581 F.2d 275, 281 (1st Cir. 1978) (need only show litigation not to be frivolous to meet the legal requirement of First Circuit's two-prong test).

If the court concludes the litigation was unnecessary or frivolous, appellants are entitled to reasonable attorneys' fees from appellees under *Christiansburg Garment Co. v. E.E.O.C., supra.*

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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October Term, 19

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No. 79-3333

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D.C. Docket No. H-78-2055-CA

IRANIAN STUDENTS ASSOCIATION, ET AL.,
*Plaintiffs-Appellees,*

DR. GRANVILLE M. SAWYER,
President, Texas Southern University, ET AL.,
*Defendants-Appellants.*

Appeal from the United States District Court for the Southern
District of Texas

Before AINSWORTH, CHARLES CLARK and WILLIAMS, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be, and the same is hereby, vacated; and that this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court;

It is further ordered that the plaintiffs-appellees pay to the defendants-appellants the costs on appeal, to be taxed by the Clerk of this Court.

March 16, 1981

Issued As Mandate: APR 7 1981

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

NO. 82-1205

DR. GRANVILLE M. SAWYER, ET AL.,
*Petitioners*

v.

IRANIAN STUDENT ASSOCIATION,
PEREYDOUN KIANI-ZEINABAD,
Individually and on Behalf of All
Others Similarly Situated,
*Respondents*

**On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit**

## RESPONDENTS' BRIEF IN OPPOSITION

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## RESPONDENTS' BRIEF IN OPPOSITION

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## I.

## INTRODUCTION

The Respondents, IRANIAN STUDENT ASSOCIATION and PEREYDOUN KIANI-ZEINABAD, respectfully request that this Court deny the Petition for Writ of Certiorari invoked pursuant to 28 U.S.C. § 1254(1), seeking review of the Fifth Circuit's opinion in this case.

That opinion is styled *Iranian Student Association, Pereydoun Kiani-Zeinabad, individually and on behalf of all others similarly situated v. Dr. Granville M. Sawyer, et al.*, No. 81-2458 and was decided on September 13, 1982 (unpublished).

## II.

## HISTORY OF LITIGATION

The Respondents/Plaintiffs (hereinafter sometimes "Plaintiffs") filed this action on October 26, 1978, in the United States District Court for the Southern District of Texas, Houston Division, to challenge Petitioners/Defendants' (hereinafter sometimes "Defendants") indefinite campus-wide ban on various activities protected by the First Amendment to the United States Constitution. The District Court did not grant Plaintiffs' ex parte Application for a Temporary Restraining Order, but scheduled a hearing on that Application for the following week.

On October 27, 1978, however, Plaintiffs' attorneys met with representatives and counsel for the Defendant University. Following that discussion, Defendant Sawyer issued a Memorandum cancelling the ban. The parties subsequently agreed that Plaintiffs' claims for injunctive and declaratory relief had become moot and applied for attorney's fees under 28 U.S.C. § 1988.

On April 30, 1979, the District Court issued its Order finding that Plaintiffs were the "prevailing party." On August 10, 1979, the Court awarded Plaintiffs attorney's fees of $4,181.25 including costs, and dismissed the case.

Defendants thereupon appealed the award of attorney's fees to the United States Fifth Circuit Court of Appeals contending that the District Court's refusal to hold a

formal evidentiary hearing, on the issue whether Plaintiffs were the "prevailing party," had denied them the opportunity to show that Plaintiffs' lawsuit was not a "catalytic factor" in Defendants' decision to withdraw the ban.

After briefing and argument, that Court vacated the judgment of the District Court and remanded the case for an evidentiary hearing on the limited question of "whether [Plaintiffs'] lawsuit was a significant catalyst to the recision of the ban." *Iranian Student Ass'n v. Sawyer*, 639 F.2d 1160, 1164 (5th Cir. 1981).

This hearing was held on August 4 and 5, 1981. On August 25, 1981, the Court issued Findings of Fact and Conclusions of Law, holding that the Plaintiffs were indeed the prevailing party and again awarded Plaintiffs attorney's fees and expenses. After additional motions and briefing, the District Court on October 16, 1981, entered its Final Judgment.

The Defendants then appealed a second time. The two issues raised on appeal were (1) whether the District Court erred in finding that the Plaintiffs were prevailing parties for purposes of an attorney's fee award, and (2) whether the findings of the District Court were clearly erroneous in finding that the attorney's fees were not grossly excessive. The Circuit Court found no error in the District Court's determination that the Plaintiffs are the prevailing party. They based this on a two-prong test:

> "The first requirement is a purely factual determination—whether the plaintiff's lawsuit is a substantial factor or significant catalyst in achieving the desired results (citations omitted) . . . The second re-

> quirement is a legal determination . . . whether the defendant's action in voluntarily meeting the demands of the plaintiffs is the result of a 'frivolous, unreasonable, or groundless' lawsuit."

The Court found that the District Court's decision was not clearly erroneous and upheld the decision to award the attorney's fees. It further found that the attorney's fees awarded were not unreasonable. It, therefore, affirmed the District Court's decision.

On January 7, 1983, the Defendants petitioned for a Writ of Certiorari. The Plaintiffs herein respond in opposition.

## III.

## REASONS WHY THE WRIT SHOULD BE DENIED

Defendants advance several reasons why they believe the Writ of Certiorari should be granted in the cause *sub judice*. They do not, however, document a conflict between the decision below and that rendered by this Court or any other federal or state tribunal. Rather, one purported reason involves no more than a request that this Court review the findings of facts concurred in by both courts below. The other reasons raise no substantive issues which have not been precluded by the prior decisions of this Court.

### A.

### Relitigation of Fact Issues

Petitioner seeks review of "Concurrent Findings of Facts." As long ago as 1923 this Court defined the factors which make up its discretionary asumption of

jurisdiction as excluding review of errors in the findings of fact of the lower courts. *Magnum Comp. v. Coty*, 262 U.S. 159, 163 (1923).

The Defendants argue that the Court below "issued its decision without any consideration as to whether the Plaintiffs would prevail if the Defendants were permitted to offer a legal defense of their actions." (Petition for Writ, p. 4.) Although they state that they are contesting the lower Court's decision that "a civil rights plaintiff is a 'prevailing party' under 42 U.S.C. § 1988 where (1) some interlocutory relief has been achieved even if not legally proper and (2) the case filed is not 'frivolous,' " (Petition for Writ, p. 4) they are actually contesting the evidentiary findings of the District Court.

The Petitioners contend that they repeatedly asked that the District Court allow them the opportunity to offer evidence that they felt would suport their positions (Petition for Writ, p. 5). In actuality, they were allowed to put on evidence at the hearing as to the on-campus protest march and subsequent disturbances, which they now allege were excluded. There was evidence from the President of the University, Dr. Sawyer, and others as to the alleged danger of violence and disruption on campus. (Petition for Writ, p. A-14 - A-20). What the Petitioners are actually requesting is the right to offer more evidence on this issue.[1]

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1. It is true that the District Court did limit the testimony to the question of whether there was sufficient justification for the Plaintiffs' cause of action to render the bringing of the action non-frivolous. However, a review of the Defendants' offer of proof demonstrates that the evidence they were precluded from introducing was merely cumulative of the testimony actually provided. A wrongful exclusion of cumulative evidence does not authorize a reversal. *Schneider v. Lockheed Aircraft Corp.*, 658 F.2d 835 (D.C. Cir. 1981) *cert. denied* ____U.S.____, 102 S.Ct. 1622.

In the body of their argument, the Defendants as much as acknowledge that their complaint is directed to the District Court's findings. In light of the subsequent affirmance by the Fifth Circuit, such an argument does not rise to the level appropriate for the exercise of this Court's certiorari jurisdiction. The question here is similar to that in *Berenyi v. District Director, Imm. and Nat. Serv.*, 385 U.S. 630 (1967) where this Court held that:

> The Petitioner asks us to reject as "clearly erroneous" the fact conclusion . . . reached by the District Judge and accepted by the Court of Appeals. In order to do so, we would be forced to disregard this Court's repeated pronouncements that it "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." (Citations omitted.)

*Berenyi v. District Director, Imm. and Nat. Serv.*, 385 U.S. at 635. No obvious or exceptional showing of error having been made, the Defendants' application should be denied. *Branti v. Finkel*, 445 U.S. 507, 512 n. 6 (1980).

## B.

## The Award is Not An Illegally Severe Financial Penalty

Next, Petitioners assert that the award of attorney's fees inflict "severe financial penalties." (Petition for Writ, p. 5.) They contend that the exposure of any party to such penalties, "when mootness deprives a party of a judicial determination of a lawsuit's meritoriousness" should only result from a clear authorization by Congress or by settled precedent. (Petition for Writ, p. 5.) The Petitioners cite as authority the dissent from denial of certiorari in *Alioto v. Williams*, 450 U.S. 1012 (1981).

> "To treat respondents as 'prevailing parties' under § 1988 because they secured a preliminary injunction is to ignore the fact that petitioners exercised their right to appeal the entry of that order and the fact that the propriety of the injunction was being challenged on appeal at the time the case became moot."

*Alioto*, 450 U.S. at 1012.

The dissent expressed concern that under the *Alioto* rationale no court would be authorized to review the actions taken by a District Judge which ultimately resulted in a Plaintiff being declared the prevailing party. That concern is not present in this case.

Congress has indicated that the Court's power to award fees is not conditioned on full litigation of the issues or a judicial determination that the Plaintiffs' rights have been violated. *Doe v. Marshall*, 622 F.2d 118 (5th Cir. 1980). Instead, as the legislative history of the act makes clear, a plaintiff need only prevail "on an important matter in the course of the litigation, even when he ultimately does not prevail on all issues." Attorney's Fees Award Act, S.R. 94-1011, 94th Cong., 2d Sess. 5, reprinted in 1976 U.S. Code Cong. & Ad. News 5908, 5912-13, reprinted by the Subcommittee On Constitutional Rights of the Committee On The Judiciary, United States Senate, *Source Book: Legislative History, Texts, and Other Documents* at p. 11. (Hereinafter *"Source Book"*).

Such cases as *Kopet v. Esquire Realty Co.*, 523 F.2d 1005 (2nd Cir. 1975) and *Thomas v. Honeybrook Mines, Inc.*, 428 F.2d 981 (3rd Cir. 1970), *cert. denied*, 401 U.S. 911 (1971) [both cited as the appropriate standard in the legislative history (*Source Book*, at 11)] make clear that Plaintiffs must be considered to have prevailed

when they vindicate rights even without formally obtaining relief. This standard is well-established.

In *Brown v. Culpepper,* 559 F.2d 274 (5th Cir. 1977), the Court held that a prevailing party should ordinarily recover attorney's fees unless specific circumstances would render such an award unjust. The Supreme Court has rejected the contention that, because the parties have settled their litigation by voluntary agreement, the Plaintiff is not a prevailing party. *Maher v. Gagne,* 448 U.S. 122, 130 (1980).

Even a case mooted by the voluntary actions of the Defendant will support a finding that the Plaintiff is a prevailing party. *See Robinson v. Kimbrough,* 652 F.2d 458 (5th Cir. 1981); *Harrington v. DeVito,* 656 F.2d 264 (7th Cir. 1981); *Gurule v. Wilson,* 635 F.2d 782 (10th Cir. 1980); *United Handicapped Federation v. Andre,* 622 F.2d 342 (8th Cir. 1980); *Nadeau v. Helgemoe,* 581 F.2d 275 (1st Cir. 1978).

A Plaintiff is considered to have prevailed on a moot claim where his lawsuit has acted as a "catalyst" in prompting the result. The legislative history of § 1988 requires this result. *Source Book* at p. 11 (Senate Report) and 215 (House Report). A case cited in this section of the legislative history illustrate the types of situations in which a Plaintiff can be found to have prevailed. *Thomas v. Honeybrook Mines, Inc.,* 428 F.2d 981 (3rd Cir. 1970), *cert. denied,* 401 U.S. 911, involved Plaintiff-Intervenors who won nothing in their litigation capacities but who were nonetheless entitled to fees for having caused the named Plaintiffs to file lawsuits which resulted in a common fund recovery benefitting the Plaintiffs and the Intervenors.

The standard in the Fifth Circuit, as found by the panel on the first appeal of this case, requires that Defendants be given an opportunity for a full evidentiary hearing on the merits of the prevailing party question. *Iranian Student Ass'n v. Sawyer,* 639 F.2d 1160, 1163-64 (5th Cir. 1981).

The Petitioners were indeed given such a hearing. Evidence was adduced at a two-day trial and thereafter the District Court made a specific finding, based upon the evidence presented, that Plaintiffs' cause was a substantial and motivating factor in the Defendants' decision to withdraw the ban on demonstrations and other First Amendment activity. Thereafter, the determination was appealed to the Fifth Circuit which, after review, affirmed by written opinion. Thus, this is not a case where the Petitioners have been denied a hearing.

Petitioners also contend that no party should be exposed to such penalties without a clear authorization by Congress. But Congress in 42 U.S.C. § 1988 specifically granted attorney's fees as costs. [The legislature had the option of making fees a question of damages, but specifically denominated them as costs.] Consequently, the congressional authorization is clear.

The power of Congress to legislate in this area cannot successfully be challenged. *Hutto v. Finney,* 437 U.S. 678 (1978). The necessary and proper clause of the Constitution, art. 1, § 8, Cl. 18, "authorizes Congress 'to exercise its best judgment in the selection of measures, to carry into execution the constitutional powers of the government,' . . . and 'avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances,' " *Buttrey v. United States,* 690 F.2d 1186, 1189

(5th Cir. 1982) [citing *Atkins v. United States*, 556 F.2d 1028, 1061 (Ct. Cl. 1977) (quoting *McCulloch v. Maryland*, 17 U.S. 316, 415-20 (1819)]. No argument is advanced that the legislature has gone beyond its powers as set out in this authorization.

## C.

## Petitioners Claim That The Fifth Circuit's Opinion Is In Conflict With the Supreme Court

The Petitioners claim that the decision of the Court below "that a prevailing party is one who achieves an interlocutory victory[2] combined with a now-frivolous cause of action" is in conflict with *Hanrahan v. Hampton*, 446 U.S. 754 (1980). The Petitioners analyze *Hanrahan* as holding attorney's fees are only proper when a party has established his entitlement to some relief on the merits of his claims and only when a party has prevailed on the merits of at least some of his claims.

This is a misreading of its facts and conclusions. In *Hanrahan* the Supreme Court held that the Plaintiffs were not a "prevailing party" on appeal notwithstanding that they secured reversal of a directed verdict and obtained certain other relief. The Court found that all the Plaintiffs had won was that which they would have been granted if they had defeated the Defendants' Motion for a Directed Verdict in the trial court. *Hanrahan v. Hampton*, 446 U.S. at 758-9.

In essence, what the Defendants have attempted to do is invert the logic of *Hanrahan* to support a conclusion

2. As we have seen, this matter does not involve an interlocutory decision within the fair meaning of that term.

directly contrary to its thrust. That case specifically holds only that evidentiary rulings will not support an immediate claim that the moving party has "prevailed" within the meaning of 42 U.S.C. § 1988. The Defendant, on the other hand, argues that the failure to prevail on an evidentiary ruling must deny Plaintiffs' attorney's fees even though the work performed was necessary for Plaintiffs to ultimately prevail.

For this proposition the Defendants do not cite a single authority from the Supreme Court nor do they set forth any contrary circuit court opinion. Such a conclusion would be directly contrary to the legislative history of the act which specifies that the purposes behind the statute are remedial in nature and designed to encourage enforcement of constitutional rights by private attorneys. *Source Book* at p. 9. This is clearly not the intent behind the act. *See, e.g., Jones v. Diamond,* 636 F.2d 1364, 1381 (5th Cir. 1981).

Since the Defendants have failed to comply with the Supreme Court's Rule 19 which generally limits review to opinions which conflict with those of other courts of appeals or with that of the Supreme Court (on an important federal question) it is clear that the Defendants have not cited sufficient reason for this Court to exercise its discretionary jurisdiction.

## D.

## Federalism Does Not Preclude The Award of Attorney's Fees

Finally, in an addendum the Petitioners put forth a "Federalism" argument. Their argument, ostensibly taken

from a Supreme Court decision, *Younger v. Harris,* 401 U.S. 37 (1971) is that "Our Federalism" constitutionally prohibits the federal government, by the enacting of 42 U.S.C. § 1988 and by judicial interpretation, from exacting money from the states without a showing of "culpability." Petition for Writ, p. 7.

This argument is advanced for the first time on this Petition for Writ. It was not at issue below. As is well recognized, this Court's prudential rule is to generally refuse to address issues first appearing in a Petition. *Delta Airlines v. August,* 450 U.S. 346 (1981); *U. S. v. Ortiz,* 442 U.S. 891 (1975); and *Neely v. Martin Koeby Const. Co.,* 386 U.S. 312 (1967).

More importantly, the Petitioners' argument appears to be that this opinion limits congressional power to enact civil liberties legislation. The Supreme Court, in *Younger,* simply held that a federal plaintiff, even if prosecuted (criminally or otherwise) under an unconstitutional state statute, was not entitled to federal court equitable relief during the pendency of a state court prosecution. *Younger v. Harris, supra.* Thus, *Younger* holds no authority for the proposition advanced by the Petitioners.

While *Younger's* theoretical underpinnings are somewhat murky, the reasons for its policy of judicial restraint have been identified. These reasons revolve primarily around the functional identity of the federal judicial system and its judge-made role, if any, in supervising state court prosecution. *Younger* does, however, make quite clear that the Supreme Court presumes that the will of Congress in the area occupied by *Younger* would override notions of "comity" and "federalism."

> Since the beginning of this country's history Congress has, subject to few exceptions, manifested the desire to permit state courts to try state cases free from interference by federal courts. . . . a comparison of [congressional acts] graphically illustrates how few and minor have been the exceptions granted from the flat, prohibitory language of [such acts].

*Younger v. Harris,* 401 U.S. at 43.

Of course, if Congress has the power to override *Younger's* policy of judicial restraint, then *Younger's* rationale can hardly be claimed to deprive Congress of the power to legislate generally.

Thirdly, even if *Younger* could be stretched to support a general bar to federal actions in relationship to the state, it cannot preclude Congress from successfully enacting 42 U.S.C. § 1988.

In some contexts the Supreme Court has limited congressional power to enact legislation affecting intimate functions of the states. *See, e.g., National League of Cities v. Usery,* 426 U.S. 833 (1976). However, *Usery* has no impact over congressional enactments made pursuant to § 5 of the 14th Amendment. That amendment, as to evils it is designed to remedy, is inconsistent with the existence of dual sovereignty. The states, by ratifying it, have waived their general right against preemption of their powers where the exercise of such powers violates the constitution or laws of the United States.

> In [§ 5 of the 14th Amendment] Congress is expressly granted authority to enforce "by appropriate legislation" the substantive provisions of the 14th Amendment, which themselves embody significant limitations on state authority. When Congress acts

> pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a congressional amendment whose other sections by their own terms embody limitations of state authority.

*Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976). *See also Katzenback v. Morgan*, 384 U.S. 641, 651 n. 10 (1966).

Since 42 U.S.C. § 1988 was enacted as an exercise of the powers granted Congress by § 5, [*see Hutto v. Finney*, 437 U.S. 678 (1978)], traditional notions of federalism are non-applicable. In this context, the argument that Congress cannot establish a standard, to use the Defendants' phrase, of "adjudicated fault" has no relevance.

## IV.

## CONCLUSION

For the foregoing reasons, Respondents suggest that the Petition for Writ of Certiorari to the United States Supreme Court should be denied.

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## CERTIFICATE OF SERVICE

I, the undersigned attorney, hereby certify that the above and foregoing Respondents' Brief in Opposition was mailed, first-class mail, postage pre-paid, to Ms. Laura S. Martin, Assistant Attorney General, State of Texas, Courts Building, P. O. Box 12548, Capitol Station, Austin, Texas 78711, on this the _____ day of February, 1983.

J. PATRICK WISEMAN